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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 57

STATE OF MISSOURI, AT THE RELATION OF
LLOYD GAINES, PETITIONER,

vs.

S. W. CANADA, REGISTRAR OF THE UNIVERSITY
OF MISSOURI, AND THE CURATORS OF THE
UNIVERSITY OF MISSOURI

ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF THE STATE
OF MISSOURI.

PETITION FOR HABEAS CORPUS FILED MAY 24, 1932.

HABEAS CORPUS GRANTED OCTOBER 12, 1933.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 57

STATE OF MISSOURI, AT THE RELATION OF
LLOYD GAINES, PETITIONER,

vs.

S. W. CANADA, REGISTRAR OF THE UNIVERSITY
OF MISSOURI, AND THE CURATORS OF THE
UNIVERSITY OF MISSOURI

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF MISSOURI

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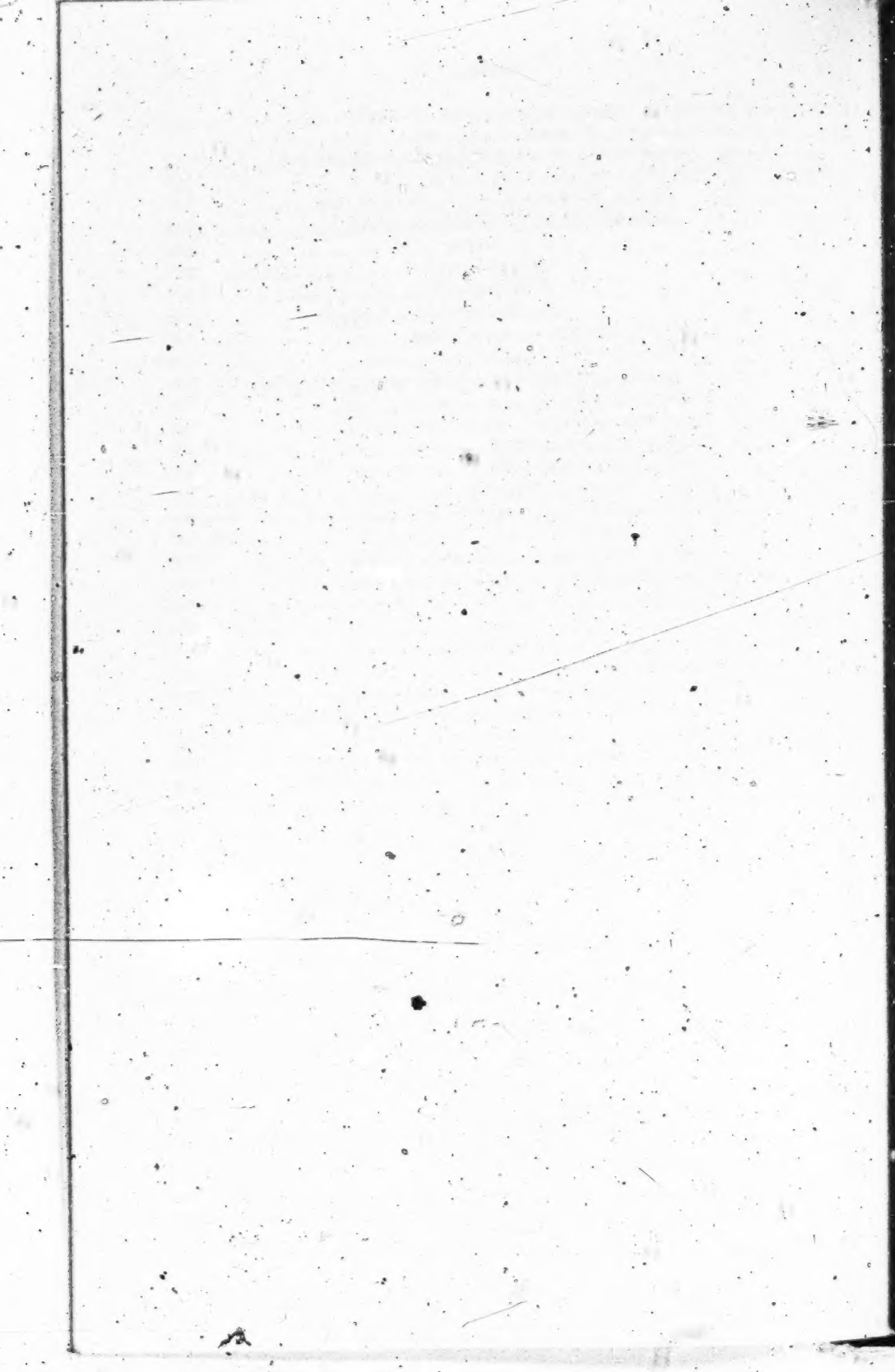
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[fol. a] UNITED STATES OF AMERICA,
State of Missouri, ss:

Be it Remembered that, heretofore, to-wit, on the 15th day of August 1936, there was filed in the office of the clerk of the Supreme Court of the State of Missouri, in a cause entitled The State of Missouri at the relation of Lloyd L. Gaines, appellant, against S. W. Canada, Registrar of the University of Missouri, and the Curators of the University of Missouri, a body corporate, respondents, No. 35286, a certified transcript of the judgment of the Circuit Court of Boone County, and of the order of said Circuit Court allowing an appeal from said judgment to said Supreme Court of the State of Missouri, which said transcript is in words and figures following to-wit:

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI, JUNE
TERM, 1936

Ninth day of Term

Friday, July 10th, 1936.

(34337)

THE STATE OF MISSOURI at the Relation of LLOYD L. GAINES,
Relator,

vs.

S. W. CANADA, Registrar of the University of Missouri and
the Curators of the University — Missouri, a Body Corporate, Respondents

Now on this 10th day of July, 1936, come all parties herein by their respective attorneys, and this cause having been specially set for this day and being now called for trial, all parties answer ready for trial, and the trial of this cause doth proceed before the Court. And the Court, after [fol. b] hearing the evidence adduced by the parties and the argument of respective counsel, doth take this cause under advisement until some day later during this term of this Court.

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI, JUNE
TERM, 1936

Eleventh Day of Term

Friday, July 24th, 1936.

(34337)

THE STATE OF MISSOURI at the Relation of LLOYD L. GAINES,
Relator,

vs.

S. W. CANADA, Registrar of the University of Missouri and
the Curators of the University of Missouri, a Body Cor-
porate, Respondents

JUDGMENT ENTRY

Now on this 24th day of July, 1936, at the June Term, 1936, come the parties by their attorneys of record; and the court having heretofore heard the evidence and the arguments of counsel, and the case having been tried, submitted and taken under advisement for the filing of briefs by the respective parties, and the court now being fully advised in the premises doth now find the issues herein in favor of the respondents and against the relator. Wherefore, it is by the court considered, ordered and adjudged that the relator Lloyd L. Gaines take nothing by his writ herein; that relator is not entitled to any relief prayed herein, and is not entitled to a writ of mandamus against the respondents herein; and that the alternative writ of mandamus herein be, and the same is now, hereby quashed, set aside and for naught held; and that this suit be and the same is now hereby dismissed, and that respondents go hence discharged without day and recover from relator their costs herein, and that execution issue therefor.

And now on the same day and at the same term comes relator and files his motion for a new trial herein, which motion is now by the parties presented to the court, and [fol. c] the court being fully advised doth now order that said motion for a new trial be and the same is now overruled, to which ruling and order relator excepts.

And now upon application of relator it is by the Court ordered that the relator may file his bill of exceptions within the time provided by law.

And now on the same day and at the same term comes relator and files his application and affidavit for an appeal from the judgment herein to the Supreme Court of Missouri, which application is now by the court sustained and an appeal is now by the court allowed to the relator from the judgment herein to the Supreme Court of Missouri.

The amount of the relator's appeal bond is now by the court fixed in the sum of Three Hundred Dollars (\$300.00), and relator is now by the court allowed time in vacation not exceeding ten days after the adjournment of the present term of this court in which to file same.

STATE OF MISSOURI,

County of Boone, ss:

I, Floyd Roberts, Clerk of the Circuit Court, within and for the County and state aforesaid, hereby certify that the above and foregoing is a true and perfect copy of the judgment, Order and Decree of the Boone County Circuit Court, together with the Order granting appeal, as made and entered in the case of the State of Missouri at the relation of Lloyd L. Gaines versus S. W. Canada, Registrar of the University of Missouri, and the Curators of the University of Missouri, being case numbered 34337, as fully as the same appears of record in my office.

Witness my hand as Clerk and hereto affixed the seal of said Court. Done at office in Columbia, this 8th of August, 1936.

(Signed) Floyd Roberts, Circuit Clerk. (Seal.)

[fol:d] And thereafter, and on the 19th day of April 1937, there was filed in said cause Appellant's Abstract of Record, which said abstract is in words and figures following to-wit:

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No. 35,286

En Banc

IN THE

Supreme Court of Missouri

MAY TERM, 1937

STATE EX REL. LLOYD L. GAINES,
Appellant,

VS.

S. W. CANADA, Registrar of the University of
Missouri, and the CURATORS OF THE
UNIVERSITY OF MISSOURI,
A Body Corporate,
Respondents.

APPEAL FROM THE CIRCUIT COURT OF BOONE COUNTY,
MISSOURI.

HONORABLE W. M. DINWIDDIE, JUDGE.

ABSTRACT OF THE RECORD FOR APPELLANT

This is an action for a writ of mandamus instituted on the 15th day of April, 1936, by the appellant (relator below) against respondents (respondents below) by filing his petition in the Circuit Court of Boone County, which petition, omitting caption, is as follows:

PETITION FOR WRIT OF MANDAMUS

(Caption omitted)

To the Honorable Walter Morris Dinwiddie, Judge
of the Thirty-fourth Judicial Circuit:

The petition of Lloyd L. Gaines respectfully
shows:

1. He is twenty-four years of age and of good
moral character, a citizen of the United States
and the State of Missouri, resident in the City of
St. Louis, and a taxpayer. He desires to study law
in the School of Law of the University of Mis-
souri for the purpose of preparing himself to prac-
tise law in Missouri and for public service in said
State. In June, 1935, and in August, 1935, he duly
made application for admission to the first year
class of the School of Law of the University of
Missouri to respondent S. W. Canada, Registrar of
the University of Missouri, who has charge under
regulations of the respondent, "the Curators of
the University of Missouri," of all matters relat-
ing to the admission of students to the first year
class of said School of Law. He then possessed
and still possesses all the scholastic attainments,
mental, moral and other lawful qualifications pre-
scribed by the Constitution and statutes of the
State of Missouri, by "the Curators of the Uni-
versity of Missouri" and/or by all duly authorized
officers and agents of the same for admission into
the first year class of the School of Law of the
University of Missouri, and then tendered and still
tenders himself ready and willing to pay all law-
ful uniform fees and charges and to conform to
all lawful uniform regulations established by law-

ful authority for admission to said class. Yet on March 27, 1935, "the Curators of the University of Missouri" arbitrarily and illegally rejected his application solely on the ground he is a Negro. The School of Law of the University of Missouri is the only law school in Missouri maintained by the State and under its control, and is the only law school in Missouri that petitioner is qualified to attend. Petitioner desires that he be admitted into the first year class of the School of Law of the University of Missouri at the next regular registration period for admission to said class, which will occur in the month of September, 1936, or at the first regular registration period after this cause has been heard and determined, upon his paying the lawful uniform fees and conforming to the lawful uniform regulations for admission to said class.

2. "The Curators of the University of Missouri" is a body corporate existing in the State of Missouri by constitutional and legislative fiat of said State; and as a body corporate owns, maintains, governs and operates the state University as a public institution. "The Curators of the University of Missouri" is an administrative agency of the State of Missouri, performing an essential governmental function, with funds derived in large part from the general treasury of the State under appropriations by the state Legislature from taxes collected from the citizens at large in the State of Missouri, including petitioner. The respondent Registrar has charge of all matters relating to admission to any division of the University, and functions as an agent of "the

Curators of the University of Missouri" under said body's supervision and control.

3. "The Curators of the University of Missouri" maintains, and by and through duly appointed agents operates the School of Law as an integral component division or department of the University, primarily for the purpose of preparing qualified residents of the State of Missouri for the profession and practice of the law for public service in said State. It officially announces the objectives of the School as follows:

"The School of Law exists to serve the State and its bar. The primary aim is to equip students for the practice of law. To this end, its methods conform to the most modern standards of legal education . . .

. . . "Also, the School recognizes a duty to the state beyond the equipment and training of practitioners. Many of the University students who do not intend to practice find its courses valuable training for citizenship, for business careers, and for the service of the public Commissions and in the Legislature. The School attempts to serve the bar of the state by the publication of the Law Series of the University of Missouri Bulletin, hereinafter described.

. . . "The purpose of this publication is to present to the Missouri Bar the results of legal study and research in the field of Missouri law carried on at the School. The Series is edited by the faculty and a board of students editors chosen by the faculty from

the members of the second and third-year classes. Student editors are chosen on the basis of legal scholarship. Election to the board is an honor and a student editor has an unusual opportunity to gain experience in legal research, which should better fit him for the practice of law.

"Each number of the Series contains at least one leading article on some phase of Missouri law written by a member of the faculty and notes on recent Missouri cases, written by student editors under the direction of a member of the faculty."

The School of Law specializes in the law and procedure which regulates the course of justice and government in Missouri, and there is no other law school within or without the State of Missouri where petitioner could study Missouri law and procedure to the same extent and on an equal level of scholarship and intensity as in the School of Law of the University of Missouri. The arbitrary and illegal refusal of "the Curators of the University of Missouri" to admit him to the first year class of said School of Law solely on the ground he is a Negro, unless corrected by this Honorable Court, will inflict upon him an irreparable injury to his citizenship and place him at a distinct disadvantage in competition at the bar of Missouri and in the public service of said State with students who have had the benefit of the unique preparation in Missouri Law and procedure offered to the qualified citizens of Missouri in said School of Law.

4. "The Curators of the University of Missouri" in the School of Law of the University of Missouri offers to the qualified citizens resident of Missouri a three year course leading to the degree of Bachelor of Laws. The School of Law is on the approved list of the American Bar Association and is a member of the Association of American Law Schools, which facts give it and its graduates high standing among the legal profession. The School of Law is the only public institution in Missouri which offers a legal education to citizens or residents of Missouri.

5. The charter of "the Curators of the University of Missouri" as enacted from time to time by the legislature of the State of Missouri provides:

"All youths, resident of the State of Missouri, over the age of sixteen years, shall be admitted to all the privileges and advantages of the various classes of all the departments of the university of the State of Missouri without payment of tuition. Provided, that each applicant for admission therein shall possess such scholastic attainments and mental and moral qualifications as shall be prescribed in rules adopted and established by the board of curators; and provided further, that nothing herein enacted shall be construed to prevent the board of curators from collecting reasonable tuition fees in the professional departments, and the necessary fees for the maintenance of the laboratories in all departments of the university, and establishing such

other reasonable fees for library, hospital, incidental expenses or late registration as they may seem necessary."

6. The further requirements covering scholastic attainments and mental and moral qualifications adopted by "the Curators of the University of Missouri" pursuant to the statutory authority just cited for admission to the first year class of the School of Law of the University of Missouri are:

"The requirements for admission are the satisfactory completion of (1), a four-years' high school course, or its equivalent, and (2), the completion of one-half of the work, exclusive of correspondence work, acceptable for a Bachelors degree granted, on the basis of a four-year period of study, by the University of Missouri or any college or university accredited therewith. The Association of American Law Schools, of which this Law School is a member, interprets this requirement to mean that a candidate shall present at least 60 semester hours (or their equivalent) of college work taken in an accredited school and exclusive of credits earned in such courses as non-theory courses in Military Science Hygiene, Domestic Arts, Physical Education, Vocal or Instrumental Music.

"Admission may be by certificate from college and universities composing the Missouri College Union, or from other reputable colleges and universities. (Acceptance of such certificate lies wholly with the Committee on

Entrance of the University, and all correspondence regarding admission should be addressed to the Registrar.)

7. Petitioner is a graduate of Lincoln University in the State of Missouri, with the degree of Bachelor of Arts duly conferred upon him August 9, 1935, after he had creditably completed a four-year residence course of more than sixty hours of resident college work of a quality and quantity accepted by "the Curators of the University of Missouri" and its agents in the cases of other candidates for admission to the first year classes of the School of Law, and exclusive of credits earned in non-theory courses in military science, hygiene, domestic arts, physical education, vocal or instrumental music. Preliminary to his college work aforesaid petitioner had completed a four-year high school course.

8. Lincoln University is an accredited and reputable school and college within the meaning of the requirements of "the Curators of the University of Missouri," governing admission to the first year class of the School of Law above quoted; and is maintained by the State of Missouri and under its control. Lincoln University is a member of the North Central Association of Colleges and Secondary Schools, the standard accrediting agency for colleges in the region, which includes the State of Missouri; membership in said association by any college being a guarantee and endorsement of merit and academic standing.

9. Petitioner duly filed with and respondent

Canada duly received and accepted petitioner's record in Lincoln University in support of his application for admission to the first year class of the School of Law of the University of Missouri, and no complaint or challenge has been made by any authority or agent of the University of Missouri regarding petitioner's scholastic, mental or moral qualifications. His application was rejected, as aforesaid, solely on the ground he is a Negro.

10. Petitioner duly filed his application and supporting papers as aforesaid in ample time for the respondent, Registrar to have considered the same and admitted petitioner to the first year class of said School of Law at the last registration period for said class in September, 1935; but the respondent Registrar arbitrarily and, illegally refused to consider and act on petitioner's application until after the 1935 registration period has closed. In consequence petitioner was denied the opportunity to attend the School of Law of the University of Missouri during the academic year 1935-1936, or to appeal from an adverse decision of said Registrar in time to have had his application further considered before the close of the 1935 registration period; and has already suffered the irreparable loss of one year of his life in preparing for the practice of law and public service in Missouri.

11. The respondent Registrar refusing to act upon petitioner's application, petitioner appealed in turn to Frederick A. Middlebush and to "the Curators of the University of Missouri," but they

refused to act in the premises. On January 24, 1936, petitioner filed his petition for mandamus in this Honorable Court praying that said Registrar be compelled to perform his ministerial duty to consider and act in good faith upon petitioner's application and supporting papers. On March 27, 1936, "the Curators of the University of Missouri," rejected petitioner's application on the sole ground he is a Negro. The decision of "the Curators of the University of Missouri" is binding on the Registrar and all other officers and agencies of the University; and petitioner is without redress except at the hands of this Honorable Court.

12. Petitioner having met all lawful requirements for admission to the first year class of the School of Law of the University of Missouri, and his rejection being solely on the ground of his race or color, the respondent Registrar and "the Curators of the University of Missouri" are under a plain legal and ministerial duty to admit him to said first year class at the next regular matriculation period, which will occur in September, 1936; but unless compelled to perform said ministerial duty by writ of mandamus issued out of this Honorable Court, the respondents Registrar and "The Curators of the University of Missouri" will forever refuse to admit petitioner to said class or to permit him to study law in the School of Law of the University of Missouri.

13. The rejection of petitioner's application for admission to the first year class of the School of Law of the University of Missouri on the sole

ground he is a Negro by "the Curators of the University of Missouri" violates the Fourteenth Amendment to the Constitution of the United States in that the State of Missouri acting through its administrative officers and departments aforesaid has denied, and still denies and will continue to deny to petitioner the equal protection of the laws, and have forfeited and deprived, and will continue to forfeit and deprive him of his freedom of action and his property without due process of law; all the foregoing solely on account of the fact he is a Negro. Petitioner has no adequate or appropriate redress or remedy in the premises for the protection of his constitutional rights except the action of mandamus.

THEREFORE, petitioner Lloyd L. Gaines respectfully moves this Honorable Court for a writ of mandamus requiring S. W. Canada, Registrar of the University of Missouri, and the Curators of the University of Missouri, and each of them, to admit petitioner to the first year class of the School of Law of the University of Missouri, at the next regular admission period for said class, upon petitioner's paying the lawful uniform fees and meeting the lawful uniform requirements governing admission to said class; and further requiring of them and each of them to perform such other legal duties by way of further relief to petitioner and protection of his constitutional rights as the circumstances of the case and justice may demand.

Lloyd L. Gaines,

Petitioner.

SIDNEY B. REDMOND,
CHARLES H. HOUSTON,
HENRY D. ESPY,

Attorneys for Petitioner.

11 N. Jefferson Avenue,
St. Louis, Missouri.

State of Missouri, City of St. Louis, ss.

Personally appeared before me, the undersigned notary public in and for the city and state aforesaid, the within named Lloyd L. Gaines, who being by me first duly sworn on his oath states that the matters in said petition by him subscribed which are stated as matters of facts he knows to be true, and those stated as of information and belief he verily believes to be true.

Lloyd L. Gaines.

Subscribed and sworn to before me this 15th day of April, 1936. My commission expires

Arnett G. Lindsay,

(Seal)

Notary Public.

Thereafter, to-wit, on the 17th day of April, 1936, Honorable W. M. Dinwiddie, presiding judge of said court, granted an alternative writ of mandamus which, omitting caption, is as follows:

ALTERNATIVE WRIT OF MANDAMUS.

To S. W. Canada, Registrar of the University of Missouri; and to "the Curators of the University of Missouri," a body corporate:

Whereas Lloyd L. Gaines by his petition duly verified upon his oath has represented to us that:

"1. He is twenty-four years of age and of good moral character, a citizen of the United States and the State of Missouri, resident in the City of St. Louis, and a taxpayer. He desires to study law in the School of Law of the University of Missouri for the purpose of preparing himself to practise law in Missouri and for public service in said state. In June, 1935, and in August, 1935, he duly made application for admission to the first year class of the School of Law of the University of Missouri to respondent S. W. Canada, Registrar of the University of Missouri, who has charge under regulations of the respondent, "the Curators of the University of Missouri," of all matters relating to the admission of students to the first year class of said School of Law. He then possessed and still possesses all the scholastic attainments, mental, moral and other lawful qualifications prescribed by the Constitution and statutes of the State of Missouri, by "the Curators of the University of Missouri" and/or by all duly authorized officers and agents of the same for admission into the first year class of the School of Law of the University of Missouri, and then tendered and still tenders himself ready and willing to pay all lawful uniform fees and charges and to conform to all lawful uniform regulations established by lawful authority for admission to said class. Yet on March 27, 1935, "The Curators of the University of Missouri"

arbitrarily and illegally rejected his application solely on the ground he is a Negro. The School of Law of the University of Missouri is the only law school in Missouri maintained by the State and under its control, and is the only law school in Missouri that petitioner is qualified to attend. Petitioner desires that he be admitted into the first year class of the School of Law of the University of Missouri at the next regular registration period for admission to said class, which will occur in the month of September, 1936, or at the first regular registration period after this cause has been heard and determined, upon his paying the lawful uniform fees and conforming to the lawful uniform regulations for admission to said class.

2. "The Curators of the University of Missouri" is a body corporate existing in the State of Missouri by constitutional and legislative fiat of said State; and as a body corporate owns, maintains, governs and operates the State University as a public institution. "The Curators of the University of Missouri" is an administrative agency of the State of Missouri, performing an essential governmental function, with funds derived in large part from the general treasury of the State under appropriations by the state legislature from taxes collected from the citizens at large in the State of Missouri, including petitioner. The respondent Registrar has charge of all matters relating to admission to any division of the University, and functions as an agent of "the Curators of the University of Missouri" under said body's supervision and control.

3. "The Curators of the University of Missouri" maintains, and by and through duly appointed agents operates the School of Law as an integral component division or department of the University, primarily for the purpose of preparing qualified residents of the State of Missouri for the profession and practice of the law for public service in said State. It officially announces the objective of the School as follows:

"The School of Law exists to serve the state and its bar. The primary aim is to equip students for the practice of law. To this end, its methods conform to the most modern standards of legal education . . .

. . . "Also, the School recognizes a duty to the state beyond the equipment and training of practitioners. Many of the University students who do not intend to practice find its courses valuable training for citizenship, for business careers, and for the service of the public Commissions and in the Legislature. The School attempts to serve the bar of the state by the publication of the Law Series of the University of Missouri Bulletin, hereinafter described.

. . . "The purpose of this publication is to present to the Missouri Bar the results of legal study and research in the field of Missouri law carried on at the School. The Series is edited by the faculty and a board of students editors chosen by the faculty from the members of the second and third-year classes. Student editors are chosen on the

basis of legal scholarship. Election to the board is an honor and a student editor has an unusual opportunity to gain experience in legal research, which should better fit him for the practice of law.

"Each number of the Series contains at least one leading article on some phase of Missouri law written by a member of the faculty and notes on recent Missouri cases, written by student editors under the direction of a member of the faculty."

5 The School of Law specializes in the law and procedure which regulates the course of justice and government in Missouri, and there in no other law school within or without the State of Missouri where petitioner could study Missouri law and procedure to the same extent and on an equal level of scholarship and intensity as in the School of Law of the University of Missouri. The arbitrary and illegal refusal of "the Curators of the University of Missouri" to admit him to the first year class of said School of Law solely on the ground he is a Negro, unless corrected by this Honorable Court, will inflict upon him an irreparable injury to his citizenship and place him at a distinct disadvantage in competition at the bar of Missouri and in the public service of said State with students who have had the benefit of the unique preparation in Missouri Law and procedure offered to the qualified citizens of Missouri in said School of Law.

4. "The Curators of the University of Missouri" in the School of Law of the University of

Missouri offers to the qualified citizens resident of Missouri a three year course leading to the degree of Bachelor of Laws. The School of Law is on the approved list of the American Bar Association and is a member of the Association of American Law Schools, which facts give it and its graduates high standing among the legal profession. The School of Law is the only public institution in Missouri which offers a legal education to citizens or residents of Missouri.

5. The charter of "the Curators of the University of Missouri" as enacted from time to time by the legislature of the State of Missouri provides:

"All youths, resident of the State of Missouri, over the age of sixteen years, shall be admitted to all the privileges and advantages of the various classes of all the departments of the university of the State of Missouri without payment of tuition: Provided, that each applicant for admission therein shall possess such scholastic attainments and mental and moral qualifications as shall be prescribed in rules adopted and established by the board of curators; and provided further, that nothing herein enacted shall be construed to prevent the board of curators from collecting reasonable tuition fees in the professional departments, and the necessary fees for the maintenance of the laboratories in all departments of the university, and establishing such other reasonable fees for library, hospital, incidental expenses or late

registration as they may seem necessary."

6. The further requirements covering scholastic attainments and mental and moral qualifications adopted by "the Curators of the University of Missouri" pursuant to the statutory authority just cited for admission to the first year class of the School of Law of the University of Missouri are:

"The requirements for admission are the satisfactory completion of (1), a four-years' high school course, or its equivalent, and (2), the completion of one-half of the work, exclusive of correspondence work, acceptable for a Bachelors degree granted, on the basis of a four-year period of study, by the University of Missouri or any college or university accredited therewith. The Association of American Law Schools, of which this Law School is a member, interprets this requirement to mean that a candidate shall present at least 60 semester hours (or their equivalent) of college work taken in an accredited school and exclusive of credits earned in such courses as non-theory courses in Military Science, Hygiene, Domestic Arts, Physical Education, Vocal or Instrumental Music.

"Admission may be by certificate from college and universities composing the Missouri College Union, or from other reputable colleges and universities. (Acceptance of such certificate lies wholly with the Committee on Entrance of the University, and all correspondence regarding admission should be addressed to the Registrar.)

7. Petitioner is a graduate of Lincoln University in the State of Missouri, with the degree of Bachelor of Arts duly conferred upon him August 9, 1935, after he had creditably completed a four-year residence course of more than sixty hours of resident college work of a quality and quantity accepted by "the Curators of the University of Missouri" and its agents in the cases of other candidates for admission to the first year classes of the School of Law, and exclusive of credits earned in non-theory courses in military science, hygiene, domestic arts, physical education, vocal or instrumental music. Preliminary to his college work aforesaid petitioner had completed a four-year high school course.

8. Lincoln University is an accredited and reputable school and college within the meaning of the requirements of "the Curators of the University of Missouri" governing admission to the first year class of the School of Law above quoted; and is maintained by the State of Missouri and under its control. Lincoln University is a member of the North Central Association of Colleges and Secondary Schools, the standard accrediting agency for colleges in the region which includes the State of Missouri; membership in said association by any college being a guarantee and endorsement of merit and academic standing.

9. Petitioner duly filed with and respondent Canada duly received and accepted petitioner's record in Lincoln University in support of his application for admission to the first year class of the School of Law of the University of Mis-

souri, and no complaint or challenge has been made by any authority or agent of the University of Missouri regarding petitioner's scholastic, mental or moral qualifications. His application was rejected, as aforesaid, solely on the ground he is a Negro.

10. Petitioner duly filed his application and supporting papers as aforesaid in ample time for the respondent Registrar to have considered the same and admitted petitioner to the first year class of said School of Law at the last registration period for said class in September, 1935; but the respondent Registrar arbitrarily and illegally refused to consider and act on petitioner's application until after the 1935 registration period has closed. In consequence petitioner was denied the opportunity to attend the School of Law of the University of Missouri during the academic year 1935-1936, or to appeal from an adverse decision of said Registrar in time to have had his application further considered before the close of the 1935 registration period; and has already suffered the irreparable loss of one year of his life in preparing for the practice of law and public service in Missouri.

11. The respondent Registrar refusing to act upon petitioner's application, petitioner appealed in turn to Frederick A. Middlebush and to "the Curators of the University of Missouri," but they refused to act in the premises. On January 24, 1936, petitioner filed his petition for mandamus in this Honorable Court praying that said Registrar be compelled to perform his ministerial duty

to consider and act in good faith upon petitioner's application and supporting papers. On March 27, 1936, "the Curators of the University of Missouri," rejected petitioner's application on the sole ground he is a Negro. The decision of "the Curators of the University of Missouri" is binding on the Registrar and all other officers and agencies of the University; and petitioner is without redress except at the hands of this Honorable Court.

12. Petitioner having met all lawful requirements for admission to the first year class of the School of Law of the University of Missouri, and his rejection being solely on the ground of his race or color, the respondent Registrar and "the Curators of the University of Missouri" are under a plain legal and ministerial duty to admit him to said first year class at the next regular matriculation period, which will occur in September, 1936; but unless compelled to perform said ministerial duty by writ of mandamus issued out of this Honorable Court, the respondents Registrar and "The Curators of the University of Missouri" will forever refuse to admit petitioner to said class or to permit him to study law in the School of Law of the University of Missouri.

13. The rejection of petitioner's application for admission to the first year class of the School of Law of the University of Missouri on the sole ground he is a Negro by "the Curators of the University of Missouri" violates the Fourteenth Amendment to the Constitution of the United States in that the State of Missouri acting

through its administrative officers and department aforesaid has denied, and still denies and will continue to deny to petitioner the equal protection of the laws, and have forfeited and deprived, and will continue to forfeit and deprive him of his freedom of action and his property without due process of law; all the foregoing solely on account of the fact he is a Negro. Petitioner has no adequate or appropriate redress or remedy in the premises for the protection of his constitutional rights except the action of mandamus.

NOW THEREFORE, we being willing that full and speedy justice should be done in this behalf to him, the said Lloyd L. Gaines, do command and enjoin you that immediately after the receipt of this writ you, and each of you, admit petitioner Lloyd L. Gaines, to the first year class of the School of Law of the University of Missouri, at the next regular admission period for said class, upon petitioner's paying the lawful uniform fees and meeting the lawful uniform requirements governing admission to said class; or that you appear before the Circuit Court of Boone County, at the City of Columbia, on the 27th day of April, 1936, at 9 o'clock, to show cause for your refusal so to do. Herein fail not at your peril, and have then and there this writ.

Witness W. M. Dinwiddie, Judge of the Circuit Court of Boone County, Missouri, and the seal of said Court hereto affixed, this 17th day of April, 1936.

Floyd Roberts,

(Seal) Clerk, Circuit Court of Boone County.

Thereafter in due time, during the April Term, 1936, of said court respondents filed their return to the aforesaid alternative writ in said cause, which return, omitting caption, is as follows:

RESPONDENTS' RETURN TO THE ALTERNATIVE WRIT OF MANDAMUS.

Now come the respondents S. W. Canada, Registrar of the University of Missouri, and the Curators of the University of Missouri, a body corporate (referred to in the alternative writ as "defendants"), and for their answer and return to the alternative writ of mandamus issued herein, respondents state:

I.

1. The alternative writ of mandamus herein should be quashed for the reason that relator's petition and said alternative writ each fails to state facts sufficient to constitute a cause of action against respondents, or to entitle relator to any of the relief which he prays, or to any of the relief demanded by said alternative writ of mandamus.

2. Respondents deny that they have any knowledge or information thereof sufficient to form a belief as to the truth of the allegation that relator Gaines (designated in the alternative writ as "plaintiff" and as "petitioner") is a taxpayer; and respondents therefore deny that relator Gaines is a taxpayer. Respondents deny

that in June, 1935, or in August, 1935, relator possessed or still possesses all the lawful qualifications, other than mental and moral qualifications, prescribed by the Constitution and statutes of the State of Missouri, by the Curators of the University of Missouri and/or by all duly authorized officers and agents of the same, for admission into the first year class of the School of Law of the University of Missouri. Respondents deny that relator then tendered or still tenders himself ready and willing to conform to all lawful uniform regulations established by lawful authority for admission to said class. Respondents deny that on March 27, 1936, the Curators of the University of Missouri arbitrarily or illegally rejected relator's application; and respondents state that the actual grounds for the rejection of relator's application by the Curators of the University of Missouri were stated in a resolution adopted by the Curators of the University of Missouri on March 27, 1936, which resolution was as follows:

"WHEREAS, Lloyd L. Gaines, colored, has applied for admission to the School of Law of the University of Missouri, and

WHEREAS, the people of Missouri, both in the Constitution and in the Statutes of the State, have provided for the separate education of white students and negro students, and have thereby in effect forbidden the attendance of a white student at Lincoln University, or a colored student at the University of Missouri, and

WHEREAS, the Legislature of the State of Missouri, in response to the demands of the citizens of Missouri has established at Jefferson City, Missouri, for negroes, a modern and efficient school known as Lincoln University, and has invested the Board of Curators of that institution with full power and authority to establish such departments as may be necessary to offer to students of that institution opportunities equal to those offered at the University, and have further provided, pending the full development of Lincoln University, for the payment, out of the public treasury, of the tuition, at universities in adjacent states, of colored students desiring to take any course of study not being taught at Lincoln University, and

WHEREAS, it is the opinion of the Board of Curators that any change in the State system of separate instruction which has been heretofore established, would react to the detriment of both Lincoln University and the University of Missouri,

THEREFORE, BE IT RESOLVED, that the application of said LLOYD L. GAINES be and it hereby is rejected and denied, and that the Registrar and the Committee on Entrance be instructed accordingly."

Respondents deny that relator Gaines is qualified or entitled to attend the School of Law

of the University of Missouri. Respondents deny that at the next regular registration period for admission to the first year class of the said School of Law, in September, 1936, or at the first regular registration period after this cause has been heard and determined, relator can possibly conform to the lawful uniform regulations or requirements for admission to said class.

3. Respondents deny any knowledge or information thereof sufficient to form a belief as to the allegation that the funds used by the Curators of the University of Missouri in operating the State University are derived in part from taxes (if any) collected from relator; and respondents therefore deny the allegation that the funds used by the Curators of the University of Missouri in operating the State University are derived in part from taxes collected from relator.

4. Respondents deny that the maintenance and operation by the respondent Curators of the School of Law of the University of Missouri is primarily for the purpose of preparing qualified residents of the State of Missouri for the profession and practice of the law and for public service in said State of Missouri; and respondents state that that is but one of the purposes, and not the primary purpose, in the maintenance and operation of said School of Law. Respondents deny that said School of Law specializes in the law and procedure which regulates the course of justice and government in Missouri; and respondents deny that there is no other law school

within or without the State of Missouri where relator could study Missouri law and procedure to the same extent or on an equal level of scholarship and intensity as in the School of Law of the University of Missouri. Respondents deny that the refusal of the Curators of the University of Missouri to admit relator to the first year class of said School of Law was solely on the ground that he is a negro, and deny that said refusal was or is arbitrary or illegal. Respondents deny that said refusal will inflict upon relator an irreparable injury to his citizenship, or will place him at a distinct disadvantage in competition at the bar of Missouri or in the public service of said state, with students who have had the benefit of the preparation in Missouri law and procedure offered to qualified citizens of Missouri in said School of Law. Respondents deny that the preparation in Missouri law and procedure offered to the qualified citizens of Missouri in said School of Law is unique.

5. Respondents deny that the statutory enactment quoted in paragraph 5 of the alternative writ is any provision or part of any "charter" of the Curators of the University of Missouri. Respondents state that said statutory enactment (Sec. 9657, R. S. Mo. 1929) specifying the youths legally entitled to admission as students in the University of Missouri, is in *pari materia* and must be construed and applied in connection with the provisions of the Constitution of Missouri, other statutory provisions of the State of Missouri, and the public policy of the State of Mis-

souri hereinafter set forth; and when so construed and applied, the respondents are thereby legally forbidden to admit the relator, who is a negro, as a student in the University of Missouri or in the School of Law therein, or in any department thereof.

6. Respondents deny that Lincoln University is an accredited school and college within the meaning of the requirements of the Curators of the University of Missouri quoted in paragraph 6 of the alternative writ, governing admission to the first year class of the School of Law of the University of Missouri.

7. Respondents admit that relator duly filed with respondent Canada, and that said respondent duly received, relator's record in Lincoln University; but respondents deny that respondent Canada duly accepted relator's record in Lincoln University in support of his application for admission to the first year class of the School of Law of the University of Missouri. Respondents deny that relator's application was rejected solely on the ground that he is a negro; and respondents state that relator's application was rejected on all of the grounds expressly recited and stated in the resolution of the Board of Curators of the University of Missouri, which is set forth in paragraph 2 of this answer and return.

8. Respondents deny that relator duly filed his application and supporting papers as aforesaid in ample time for the respondent Registrar to have considered the same and admitted relator to the first year class of said School of Law at

the last registration period of said class in September, 1935; and respondents deny that any of the respondents had the legal authority to admit relator to said class regardless of when his application was filed. Respondents deny that the respondent Registrar arbitrarily and illegally refused to consider and act on relator's application until after the 1935 registration period had closed. Respondents deny that in consequence of any "arbitrary or illegal refusal by respondent Registrar" (respondents expressly denying that there was any such arbitrary or illegal refusal) to consider and act on relator's application until after the 1935 registration period had closed, relator was denied the opportunity to attend the School of Law of the University of Missouri during the academic year 1935-1936, or to appeal from an adverse decision of said Registrar in time to have had his application further considered before the close of the 1935 registration period, or that relator has already suffered the irreparable loss of one year of his life in preparing for the practice of law and public service in Missouri.

9. Respondents deny that respondent Registrar refused to act upon relator's application, and that relator appealed in turn to Frederick A. Middlebush and to the Curators of the University of Missouri, and deny that they refused to act in the premises. Respondents deny that on March 27, 1936, the Curators of the University of Missouri rejected relator's application on the sole ground he is a negro. Respondents deny that relator without redress except at the hands of this Honorable Court.

10. Respondents deny that relator has met all lawful requirements for admission to the first year class of the School of Law of the University of Missouri; and deny that his rejection is based solely on the ground of his race or color; and deny that respondent Registrar and the Curators of the University of Missouri are under a plain legal and ministerial duty to admit relator to said first year class at the next regular matriculation period, which will occur in September, 1936.

11. Respondents deny that the rejection of relator's application for admission to the first year class of the School of Law of the University of Missouri was on the sole ground that he is a negro; and respondents deny that said rejection violated the Fourteenth Amendment to the Constitution of the United States; and deny that the State of Missouri acting through its administrative officers and department aforesaid has denied or still denies or will continue to deny to relator the equal protection of the laws, or have forfeited and deprived or will continue to forfeit and deprive him of his freedom of action or his property without due process of law; and deny that relator has been or is being or will be denied the equal protection of the laws, or that he has been, is being or will be deprived of his freedom of action or property without due process of law. Respondents deny that relator has been, is being or will be denied any of his lawful rights, or of the equal protection of the laws, or of freedom of action or property, solely on account of the fact that he is a negro. Respondents deny that relator has no

adequate or appropriate redress or remedy in the premises for the protection of his constitutional rights except the action of mandamus.

II.

It is contrary to the Constitution, laws and public policy of the State of Missouri for respondents to admit relator, who is a negro, as a student in the University of Missouri or in any school or department thereof. The Constitution, laws and public policy of the State of Missouri forbid the respondents to admit any negro as a student in the University of Missouri or in any school or department thereof. If the respondents should obey the command of the alternative writ of mandamus herein, and should admit relator to the first year class, of the School of Law of the University of Missouri, the respondents would be acting in violation of their legal duty, and in violation of the Constitution, laws and public policy of the State of Missouri, which require a separation of the white and negro races for the purpose of education, and require that members of the white race and members of the negro race shall be educated in separate public schools and universities, and forbid a white student to attend a negro school or university and forbid a negro student to attend a white school or university of the State of Missouri. The provisions of the Constitution and laws of Missouri which so ordain, and which establish the aforesaid public policy of the state, are as follows:

Sec. 3 of Article XI of the Constitution of

Missouri provides: "Separate free public schools shall be established for the education of children of African descent."

Sec. 5 of Article XI of the Constitution of Missouri provides: "The General Assembly shall, whenever the public school fund will permit and the actual necessity of the same may require, aid and maintain the State University, now established, with its present departments. The government of the State University shall be vested in a Board of Curators, to consist of nine members, to be appointed by the Governor, by and with the advice and consent of the Senate." When this constitutional provision was adopted by the people of the State of Missouri the State University mentioned therein, being the University of Missouri, had long been established and was then being operated as a university for white students only; and negro students had never up to that time and have never at any time been admitted as students therein. By the adoption of this constitutional provision for the maintenance of the University of Missouri as then established, the Constitution in legal effect required the continued maintenance and operation of said University as one for white students exclusively, and forbade the respondents to admit a negro as a student therein.

By Sec. 9216, R. S. Mo. 1929, it is provided that "separate free schools shall be established for the education of children of African descent; and it shall thereafter be unlawful for any colored child to attend any white school, or for any white child to attend a colored school." Under Secs. 9217,

9346, 9347, 9348 and 9349 there have been and are established throughout the State of Missouri free public schools for negroes, and relator has received free education in such schools so established.

By Article 19 of Chapter 57 (Secs. 9616 to 9624, R. S. Mo. 1929, inclusive) the State of Missouri has established in Cole County, Missouri, Lincoln University, a university for the education of negro students of the state; and the State of Missouri each year has expended and continues to expend several hundred thousand dollars per year in maintaining and operating Lincoln University. By said article the control of Lincoln University is vested in a Board of Curators composed of the Superintendent of Instruction ex-officio and six members, at least three of whom are negroes. By said article the Board of Curators of Lincoln University are authorized and required to reorganize said institution so that it shall afford to the negro people of the state opportunity for training up to the standard furnished at the University of Missouri whenever necessary or practicable in their opinion; and to this end said Board of Curators are authorized to purchase necessary additional land, to erect necessary additional buildings, to provide necessary additional equipment, and to locate, in the County of Cole, the respective units of the University where, in their opinion, the various schools will most effectively promote the purposes of said article. By said article it is further provided that the Board of Curators of Lincoln University shall organize after the manner of the

Board of Curators of the University of Missouri, with like powers, authority, responsibilities, privileges, immunities, liabilities and compensation. By said article it is further provided as follows:

"Pending the full development of the Lincoln University, the board of curators shall have the authority to arrange for the attendance of negro residents of the state of Missouri at the university of any adjacent state to take any course or to study any subject provided for at the state university of Missouri, and which are not taught at the Lincoln University and to pay the reasonable tuition fees for such attendance; provided that whenever the board of curators deem it advisable they shall have the power to open any necessary school or department."

The duties thus imposed upon the Board of Curators of Lincoln University are mandatory in their nature, and the effect of said Article 19 creating Lincoln University and the appropriation acts herein mentioned is to afford to the negroes of the State of Missouri, including relator, equal protection of the laws and equal opportunity with that accorded to white citizens, for education, culture and training afforded by the University of Missouri to students in its various departments, including the School of Law, and accords to every negro citizen in the State of Missouri, including this relator, due process of law with respect to his rights and liberties concerning the acquisition of an education, including an education in the law.

Relator has availed himself of said equal opportunity for education accorded by the State to negroes, and has received the benefits and advantages of education in Lincoln University; and in August, 1935, relator became a graduate of Lincoln University with the degree of Bachelor of Arts. Although relator has thus availed himself of the education in arts and sciences afforded by Lincoln University, he now refuses (as hereinafter shown) to avail himself of the opportunity afforded to him, through the establishment of Lincoln University, to receive education in the law, and seeks by this proceeding to compel respondents to admit him into the School of Law of the University of Missouri in violation of the Constitution, laws and public policy of the State of Missouri as herein shown.

Lincoln University was established by the Legislature of the State of Missouri in 1921, at which time the name of Lincoln Institute, a school theretofore maintained for the education of negroes, was changed to Lincoln University. By acts of appropriation by the Legislature of the State of Missouri at the biennial sessions from the year 1921 to the year 1935 inclusive there has been appropriated and made available for the support, maintenance and operation of Lincoln University the total sum of \$3,477,153.49. By acts of the Legislature of the State of Missouri at the biennial sessions from the year 1929 to the year 1935 inclusive there has been separately appropriated and made available the additional total sum of \$55,615.91 to be used in paying the tuition of negroes

at standard colleges or universities not located in Missouri, in those cases where negro students are pursuing courses of study not offered at Lincoln University but which are offered at the University of Missouri.

By Sec. 9639, R. S. Mo: 1929, it is provided that the Curators of the University of Missouri shall severally take, and the respondent Curators have severally taken, an oath to support the Constitution of Missouri and to faithfully demean themselves in office; and it is thereby made the sworn duty of said Curators to comply with all of the aforesaid provisions of the Constitution and statutes, and with the public policy of the state aforesaid, requiring a separation of the white and negro races for the purpose of education.

The foregoing provisions of the Constitution and Statutes of the State of Missouri have established as the law and public policy of the State of Missouri, binding upon the respondents, that a negro shall not be admitted as a student in the University of Missouri or in any school or department thereof. In refusing to admit the relator, a negro, as a student in the School of Law of the University of Missouri the respondents have therefore acted and are acting lawfully, in conformity with their sworn constitutional and legal duty, in compliance with the Constitution, laws and public policy of the State of Missouri as aforesaid, and not otherwise.

III.

If relator desires to become a student in a

school of law and to receive a legal education as he alleges, then by the Constitution, laws and public policy of the State of Missouri relator is fully accorded the opportunity to do so; and the opportunity so accorded to him is equal to the opportunity which the state accords to white students to receive education in the School of Law of the University of Missouri.

Relator is by Sec. 9618, R. S. Mo. 1929, accorded the opportunity to apply to the Board of Curators of Lincoln University for education in a school of law up to the standard of legal education furnished by the School of Law in the University of Missouri, either by said Board establishing such a school of law as a part of Lincoln University, or, pending that, by said Board arranging for the attendance of relator at the University of some adjacent state (Kansas, Nebraska, Iowa or Illinois) and to take the law course and to study the subjects provided for in the School of Law of the University of Missouri, and by said Board paying the reasonable tuition fees for such attendance by relator. The Legislature of Missouri has appropriated, and there is now and has been at all times available, more than a sufficient sum of money to enable the Board of Curators of Lincoln University to arrange for the attendance of relator at the University of any one of said four adjacent states to take the law course and study the subjects provided for in the School of Law of the University of Missouri, and to pay the reasonable tuition fees for such attendance. In the state university of each of the four states men-

tioned there is a School of Law which offers to students therein a course of education in the law which fully measures up to the standard of education offered to students in the School of Law of the University of Missouri. In the school of law in the university of each of said four states the relator could study Missouri law and procedure to the same extent and on an equal level of scholarship and intensity as in the School of Law of the University of Missouri. Negro students are admitted into the school of law in the state university of each of said four adjacent states. By the entrance requirements for admission to the first year class of the school of law of the state university of each of said four states, the relator is qualified and is otherwise eligible for admission (and if he applied he would be admitted) as a student in the first year class in the school of law of the state university of any one of said four adjacent states.

By the laws of Missouri there is therefore provided for relator an opportunity equal to that provided by the state for white citizens in Missouri, to receive an education in the law. Although prior to the institution of this suit respondents gave to relator actual notice of these statutory provisions for his benefit, relator has chosen not to avail himself thereof, and he has failed and refused to avail himself thereof, or to make any effort to avail himself thereof; and instead relator seeks by the extraordinary remedy of mandamus to compel respondents to admit him as a student in the University of Missouri, in

violation of the Constitution, laws and public policy of the State of Missouri as aforesaid. For each and all of the reasons aforesaid the relator has a full, complete and adequate remedy otherwise than by the extraordinary remedy of mandamus; and relator has no right to the remedy of mandamus or to any of the relief prayed for herein.

WHEREFORE, respondents pray that the alternative writ of mandamus herein be quashed, that relator be denied all of the relief prayed and be adjudged and decreed to have no right to any of the relief prayed, and that this suit be dismissed, and that respondents be adjudged to go hence discharged without day, and to recover their costs herein.

FRED L. WILLIAMS,
NICK T. CAVE,
WILLIAM S. HOGSETT,
Attorneys for Respondents.

Thereafter in due time, during the April Term, 1936, of said court, appellant filed his reply to said return, which reply, omitting caption, is as follows:

RELATOR'S REPLY TO RESPONDENTS' RETURN.

Now comes Lloyd L. Gaines, relator, and first saving all objections and exceptions which may be his by reason of the many imperfections and defects in respondents' return to the alternative writ of mandamus issued in this cause, for reply to said return says:

I.

1. He denies that his petition and said alternative writ failed to state facts sufficient to constitute a cause of action against respondents or to entitle him to all of the relief for which he prays.

2. Relator denies that so far as respects admission to said School of Law of the University of Missouri, Section 9657 R. S. Mo. 1892, can be construed with any provisions of the Constitution of Missouri or statutes of Missouri regarding education, and denies that any question of public policy is affected. He denies that any construction of Section 9657 forbids respondents to admit relator to the School of Law of the University of Missouri, and says that when said Section 9657 is read in the light of the Constitution of the United States, especially the Fourteenth Amendment thereto, respondents are under a plain, legal, ministerial duty to admit relator to the School of Law of the University of Missouri, at the next regular admission period for the first year class of said School, upon relator's paying the lawful uniform fees and meeting the lawful uniform requirements governing admission to said class.

3. Relator denies that his application was rejected on any ground other than the one that he is a Negro.

II.

4. By way of further reply to Part II of respondents' return relator denies that it is con-

trary to the constitution, law or public policy of Missouri for respondents to admit him as a student in the School of Law of the University of Missouri. He denies that if respondents should obey the command of the alternative writ and admit him to the first year class of the School of Law they would be acting in violation of their legal duty or in violation of the constitution, laws or public policy of Missouri. He denies that the constitution, laws or public policy of Missouri forbid a white student to attend a Negro university or college or a Negro student to attend a white university in Missouri. On the other hand he states that under the Constitution of Missouri, the laws and public policy of the State, when construed and reconciled with the requirements of the Constitution of the United States, especially the Fourteenth Amendment thereto, respondents have arbitrarily and illegally rejected his application for admission to the first year class of the School of Law of the University of Missouri solely on account of the fact he is a Negro, and are under a plain legal, ministerial duty to admit him upon the same terms and conditions imposed upon qualified students who are not Negroes and apply for admission to the first year class of the School of Law.

5. Relator admits that Sections 3 and 5 of Article XI of the Constitution of Missouri are as quoted in the return, but says that Section 3 has no bearing on the issues raised in the principal case. As to Section 5, relator says that the Constitution of Missouri of which said Section is part, was adopted in 1875, after the passage and adop-

tion of the Fourteenth Amendment to the Constitution of the United States; that he is not familiar with the history of the University of Missouri before Section 5 was adopted, and does not have any knowledge or information thereon sufficient to enable him to form a belief as to whether Section 5 attempted to establish or perpetuate the University of Missouri as a white institution, from which qualified Negroes were to be excluded solely on account of race or color, and demands strict proof of the allegation. Regardless of the intent of the framers of the Missouri Constitution as to Section 5, relator says that construed and reconciled with the Constitution of the United States, especially the Fourteenth Amendment thereto, Section 5 could not establish or perpetuate the University of Missouri as a white institution from which qualified Negroes should be excluded solely on account of race in the absence of an equal university and educational opportunity being offered to said qualified Negroes within the State of Missouri.

6. Relator admits that Section 9216, R. S. Mo. 1929, is as quoted by respondents; so also under Section 9217, 9346, 9347, 9348 and 9349, free public schools for Negroes have been established throughout Missouri as alleged by respondents. But relator says that the above sections have nothing to do with the issues in this case whether he, being otherwise qualified, shall be denied admission to the School of Law of the University of Missouri solely on account of his race. If the same be material he says that the free public schools established for Negroes throughout the State by and

large are inferior and do not offer equal educational opportunities as the white free public schools.

7. Relator admits that the State has established Lincoln University for the education of Negroes, but denies that Lincoln University is a university other than in name, and states that it is merely an undergraduate college and has no instruction in law and no school of law in any way connected with it.

7a. Relator admits that Article 19 of Chapter 57, R. S. Mo., 1929, requires the Board of Curators of Lincoln University to reorganize said institution so that it shall afford to the Negro people of the state opportunity for training up to the standard furnished at the state university of Missouri whenever necessary and practicable; but states that the Board of Curators have not established a School of Law or offered instruction in law at Lincoln University; that they have no definite plans for establishing a School of Law or offering instruction in law at Lincoln University; that they cannot establish a School of Law or offer instruction in law at Lincoln University, even if they so desired, without curtailing or discontinuing some of the existing courses offered at Lincoln University, for the state legislature has not made any appropriation for the expansion of Lincoln University into offering professional courses or establishing a School of Law at Lincoln University, and there is no money otherwise available for such purposes; that the money now available to the Curators of the University is barely sufficient

to enable them to maintain and operate a first grade undergraduate course. The School of Law of the University of Missouri is open and established, and amply supplied with funds both from public sources and otherwise for its continuation. Relator declines to accept the chance that some day Lincoln University may have a law school or offer instruction in law instead of exercising his right to attend the School of Law of the University of Missouri. He is growing older each day and the time within which he can study and practise his profession, and perform public service in and for the State of Missouri, is growing correspondingly shorter. He must study law as soon as he can, consistent with maintaining his rights as a citizen and resident of the state.

8. Relator denies that the scholarships offered to Negroes by the state, acting through the Board of Curators of Lincoln University, are an equivalent of their right to attend and study the same subject in the University of Missouri. He denies that it is equal protection of the laws or due process within the meaning of the Fourteenth Amendment to the Constitution of the United States for the State of Missouri to exile its Negro citizens beyond its borders to study the same subjects offered to white students in the state university at home. He denies that any money equivalent could equalize for him the loss of the opportunity to have the special study in Missouri law and procedure which is offered to white students in the University of Missouri School of Law. Further relator does not wish to be accorded any

special or favored treatment because of his race or color, and wishes only to have the same rights under the same conditions as the white citizens of the state similarly situated.

9. Relator denies that the moneys appropriated by the legislature of Missouri for Negroes to study outside the state have been adequate or sufficient to meet the legitimate demands of Negro citizens who have desired and qualified for out-of-state training.

10. Relator admits that the Curators of the University of Missouri are obliged by Section 9639, R. S. Mo., 1929, to take an oath to support the Constitution of Missouri and faithfully demean themselves in office, as alleged in the return; but says that they are also required by the same Section to take oath that they will support the Constitution of the United States (which was omitted in the return). He denies that the foregoing provision, or the Constitution or laws or public policy of Missouri have bound the respondents to refuse admission in the University of Missouri to qualified Negroes, and states that Section 9639 compels the Curators of the University of Missouri severally not to refuse admission to qualified Negroes solely on account of race and imposes upon them and their agents a plain, legal, ministerial duty to admit qualified Negroes on the same terms and conditions as qualified whites.

11. Relator denies that in refusing to admit him as a student in the School of Law of the University of Missouri respondents have acted lawfully and in conformity with their constitutional

and statutory obligations, and says that they have acted illegally, arbitrarily, and in violation of the Constitution and laws of Missouri, and the Constitution of the United States, and have denied him the equal protection of the laws and due process of law, solely on account of his race and color, in violation of the Fourteenth Amendment of the Constitution of the United States.

III.

12. For further answer to part III of respondent's return, relator says that the Constitution of United States, the Constitution of Missouri and laws of said State give him the right to be admitted as a first year student of the School of Law of the University of Missouri, being otherwise qualified therefor and being denied admission solely on account of his race and color. He denies that the State accords him otherwise an equal opportunity to study law comparable with that afforded white students in the School of Law of the University of Missouri. He denies that it is constitutional to exile Negroes to study in other states solely on account of race while white students are offered the same subjects in a public institution in Missouri; but that even if it be held constitutional in principle, the money appropriated by the state for such purpose has always been inadequate to meet the demands.

13. Relator admits that Negro students are admitted to the law schools in the state universities in Kansas, Nebraska, Iowa and Illinois; that he is qualified for admission to the same. But he

is a citizen and resident of Missouri, not of said other states, and desires to have the same rights which are accorded white citizens and residents of Missouri to attend the School of Law of the University of Missouri, and denies that he can obtain in said other law schools instruction in Missouri law to the same extent of intensity and same high degree of scholarship which are available in the School of Law of the University of Missouri.

14. Relator further says that he has not waived or forfeited his right to attend the School of Law of the University of Missouri, for that he did not receive his Bachelor's degree from Lincoln University until August, 1935; and applied in June, 1935, and again in August, 1935, for admission to the first year class of the School of Law of the University of Missouri for the academic term beginning September, 1935; and would have registered and attended said School of Law except for the arbitrary and illegal acts of the respondents in excluding him solely on account of race and color.

IV.

15. As to paragraphs and allegations contained in respondents' return that deny corresponding allegations in the petition and alternative writ filed and issued herein, relator joins issue.

S. R. REDMOND,
CHARLES H. HOUSTON,
HENRY D. ESPY,
Attorneys for Relator.

State of Missouri, City of St. Louis, ss.

Personally appeared before me, the undersigned Notary Public in and for the City and State aforesaid, the within named Lloyd L. Gaines, who being first duly sworn on his oath states that the matters in said return above which are stated as matters of fact he knows to be true, and those stated as of informations and belief he verily believes to be true.

Lloyd L. Gaines.

Subscribed and sworn to before me this 8th day of June, 1936.

(Seal)

Arnett G. Lindsay.

Thereafter in due time, during the June Term, 1936, of said court respondents filed their reply to relator's reply to respondents' return which reply, omitting caption, is as follows:

RESPONDENTS' REPLY TO RELATOR'S REPLY TO RESPONDENTS' RETURN.

Now come the above named respondents and for their reply to the relator's reply to respondents' return to the alternative writ of mandamus herein, respondents state:

I.

Respondents deny that when Section 9657, R. S. Mo. 1929, is read in the light of the Constitution of the United States, especially the Fourteenth Amendment thereto, respondents are under a plain, legal, ministerial duty to admit relator to the School of Law of the University of Missouri,

at the next regular admission period for the first year class of said school, upon relator's paying the lawful uniform fees and meeting the lawful uniform requirements governing admission to said class.

II.

Respondents deny that under the Constitution of Missouri, the laws and public policy of the state, when construed and reconciled with the requirements of the Constitution of the United States, especially the Fourteenth Amendment thereto, respondents have arbitrarily or illegally rejected relator's application for admission to the first year class of the School of Law of the University of Missouri solely on account of the fact he is a negro; and deny that respondents are under a plain, legal, ministerial duty to admit relator upon the same terms and conditions imposed upon qualified students who are not negroes and who apply for admission to the first year class of the School of Law.

Respondents deny that Section 5 of Article XI of the Constitution of Missouri, construed and reconciled with the Constitution of the United States, especially the Fourteenth Amendment thereto, could not establish or perpetuate the University of Missouri as a white institution; and respondents deny that the alleged constitutional requirement (that an equal university and educational opportunity be offered to qualified negroes) necessarily required that same be offered within the State of Missouri.

Respondents deny that the free public schools established for negroes throughout the state by and large are inferior and do not offer equal educational opportunities as the white free public schools.

Respondents deny that Lincoln University is a university merely in name, and deny that Lincoln University is merely an undergraduate college.

Respondents deny that they have any knowledge of information sufficient to form a belief as to the truth of the allegation that the Board of Curators of Lincoln University "have no definite plans for establishing a school of law or offering instruction in law at Lincoln University;" and respondents therefore deny said allegation.

Respondents deny that the Board of Curators of Lincoln University cannot establish a school of law or offer instruction in law at Lincoln University, if they so desired, without curtailing or discontinuing some of the existing courses offered at Lincoln University; and deny that the state legislature has not made any appropriation for the expansion of Lincoln University into offering professional courses or establishing a school of law at Lincoln University; and deny that there is no money otherwise available for such purposes, and deny that the money now available to the Curators of Lincoln University is barely sufficient to enable them to maintain and operate a first-grade undergraduate course.

Respondents deny that special study in Missouri law and procedure is offered to white students in the University of Missouri School of Law.

Respondents deny that the moneys appropriated by the legislature of Missouri for negroes to study outside the state have been inadequate or insufficient to meet the legitimate demands of negro citizens who have desired and qualified for out-of-state training.

Respondents deny that Section 9639, R. S. Mo. 1929, compels the Curators of the University of Missouri severally not to refuse admission to qualified negroes solely on account of race; and respondents deny that said section imposes upon said Curators or their agents the plain, legal, ministerial duty to admit qualified negroes on the same terms and conditions as qualified whites; and respondents deny that negroes are or could be legally qualified to become students in the University of Missouri or any school or department thereof.

Respondents deny that respondents have acted illegally, arbitrarily or in violation of the Constitution and laws of Missouri, or of the Constitution of the United States; and respondents deny that respondents have denied relator the equal protection of the laws and due process of law, solely on account of his race and color, in violation of the Fourteenth Amendment to the Constitution of the United States.

III.

Respondents deny that the Constitution of the United States, the Constitution of Missouri and the laws of said state give relator the right to be admitted as a first year student of the School of Law of the University of Missouri; and deny that

relator is qualified therefor; and deny that relator is being denied admission solely on account of his race and color.

Respondents deny that the State of Missouri does not accord relator an equal opportunity to study law comparable with that afforded white students in the School of Law of the University of Missouri.

Respondents deny that the provisions made by Article 19, Chapter 57 of the Revised Statutes of Missouri 1929 (authorizing the Board of Curators of Lincoln University pending the full development of Lincoln University to arrange for the attendance of negro residents of the State of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at the Lincoln University, and to pay the reasonable tuition fees for such attendance) constitutes or can be fairly characterized as an "exile" of negroes to study in other states; and respondents deny that the money appropriated by the State of Missouri for such purposes has always been inadequate to meet the demands.

Respondents deny that relator cannot obtain in the law schools in the state universities in Kansas, Nebraska, Iowa and Illinois instruction in Missouri law to the same extent of intensity and same high degree of scholarship which are available in the School of Law of the University of Missouri.

Respondents deny that relator ever had or now has the right to attend the School of Law of the University of Missouri; and respondents deny that

there have been any "arbitrary and illegal acts of the respondents in excluding him (relator) solely on account of race and color."

WHEREFORE, having fully replied, respondents pray the judgment of the court as heretofore prayed in their return to the alternative writ of mandamus.

FRED L. WILLIAMS,
NICK T. CAVE,
WILLIAM S. HOGSETT,
Attorneys for Respondents.

TRIAL, SUBMISSION AND JUDGMENT.

And thereafter, at the June Term, 1936, of said court, on July 10, 1936, said cause being called for trial, and all parties appearing ready for trial, said cause was tried before the Honorable W. M. Dinwiddie, judge of said court.

And thereafter, at the conclusion of said trial, said cause was submitted and taken under advisement by the court; and later, on July 24, 1936, during the said term, the court found for the respondents and duly entered judgment for the respondents and against appellant and quashed the alternative writ of mandamus. Said judgment is in words and figures as follows (caption omitted):

JUDGMENT ENTRY

Now on this 24th day of July, 1936, at the June Term, 1936, come the parties by their attorneys of record; and the court having heretofore heard the evidence and the arguments of counsel,

and the case having been tried, submitted and taken under advisement for the filing of briefs by the respective parties, and the court now being fully advised in the premises doth now find the issues herein in favor of the respondents and against the relator.

WHEREFORE, it is by the court considered, ordered and adjudged that the relator Lloyd L. Gaines take nothing by his writ herein; that relator is not entitled to any relief prayed herein, and is not entitled to a writ of mandamus against the respondents herein; and that the alternative writ of mandamus herein be, and the same is now, hereby quashed, set aside and for naught held; and that this suit be and the same is now hereby dismissed, and that respondents go hence discharged without day and recover from relator their costs herein, and that execution issue therefor.

MOTION FOR REHEARING FILED.

And thereafter, within four days after the judgment and decree, and during the same term, on July 24, 1936, appellant filed his motion for a rehearing in said cause.

MOTION FOR REHEARING OVERRULED.

And thereafter, on July 24, 1936, during the June Term, 1936, of said court, the court overruled appellant's Motion for a Rehearing.

AFFIDAVIT FOR APPEAL FILED.

And thereafter, during the said June Term, on July 24, 1936, appellant filed an affidavit for an appeal in said cause and said appellant was granted an appeal to the Supreme Court of Missouri.

BILL OF EXCEPTIONS FILED.

And thereafter, within the time allowed by law, and by rule of the Supreme Court of Missouri, appellant duly presented his bill of exceptions in said cause, which bill of exceptions has been duly filed, sealed and allowed by Honorable W. M. Dinwiddie, judge of said court, the same was filed and made a part of the record in said cause.

The bill of exceptions so filed and made a part of the record in said cause is in words and figures, omitting caption, as follows:

BILL OF EXCEPTIONS

(Caption omitted)

BE IT REMEMBERED, That on Friday, the 10th day of July, 1936, the same being also one of the days of the regular June term, 1936, of the Circuit Court of the County of Boone, begun and holden at the City of Columbia, in the State of Missouri, the above entitled cause came regularly on to be heard and tried upon the issues theretofore joined therein before the Honorable W. M. Dinwiddie, Judge of said Court; whereupon, the following proceedings were had herein, to-wit:

APPEARANCES

Messrs. S. R. Redmond, of St. Louis; Charles H. Houston, of New York City; and Henry D. Espy, of St. Louis, appeared as counsel for relator. The relator, Lloyd L. Gaines, was also present in person.

Messrs. Nick T. Cave, of the firm of Cave & Hulen, Columbia; William S. Hogsett and Ralph E. Murray, of the firm of Hogsett, Smith, Murray and Trippe, Kansas City; and Fred L. Williams, of the firm of Williams, Nelson and English, St. Louis; appeared as counsel for respondents. Respondent S. W. Canada, Registrar, and members of the Board of Curators of the University of Missouri, were also present in person.

Mr. Redmond made a statement to the Court on behalf of Relator.

Mr. Hogsett made a statement to the Court on behalf of Respondents.

The Court: You say there is not much dispute over the facts. Can we shorten up the introduction of evidence?

Mr. Hogsett: Counsel and we have agreed upon many of them, and we will expedite the time spent in the offering of the proof.

The Court: Very well. Call your first witness.

RELATOR'S EVIDENCE

The relator, to maintain the issues upon his part to be maintained, offered and introduced evidence as follows, to-wit:

LLOYD L. GAINES, being duly produced, sworn and examined, testified as follows, to-wit:

*Direct Examination of Lloyd L. Gaines by
Mr. Redmond*

Q. State your name, please. A. Lloyd Lionel Gaines.

Q. Where do you live? A. 3932 West Belle Place, St. Louis.

Q. Where were you born? A. In Mississippi.

Q. In what year? A. 1911.

Q. How old are you now? A. Twenty-five.

Q. How long have you lived in Missouri?

A. Ten years.

Q. In St. Louis? A. Ten years.

Q. Are you a taxpayer? A. Incidental tax.

Q. What tax do you pay? A. Sales tax, internal tax on luxuries, and amusement tax.

Q. What are your educational accomplishments? A. I have been in school.—I completed a high school and an A. B. in college.

Q. What high school did you finish? A. Vashon High School, St. Louis, Missouri.

Q. What year? A. 1931.

Q. What college have you finished? A. I attended Stowe College, 1931-32, and finished Lincoln University in August, 1935.

Q. What degree did you receive? A. A. B.

Q. Have you made up your mind as to what you wish to do in life? A. I have.

Q. What do you wish to do? A. I wish to practise Law.

Q. Have you made application to any schools, to enter the Law School, A. I have.

Q. To what schools have you made application? A. I have only made application to the University of Missouri.

Q. Do you remember when you made the application? A. Yes, sir.

Q. When was that? A. It was August 19th, 1935.

Q. Have you made inquiries as to any other law school? A. Yes, sir.

Q. What other law schools? A. The University of Iowa, and University of Illinois.

Q. I now show you Relator's Exhibit A and ask you what it is. (Handing an envelope to witness) A. It was a letter from the Registrar of the University of Iowa, in which he remarked that he sent me a catalogue and also application blanks for the school.

Mr. Redmond: I offer this in evidence,—it is an envelope.

Mr. Williams: No objection to the envelope.

The Court: Admitted.

Said Relator's Exhibit A is an envelope bearing printed return card in left upper corner as follows: "Return in five days to The State University of Iowa Office of the Registrar Iowa City," canceled 3c stamp, rubberstamped "Iowa City, Iowa, June 15, 4 PM, 1935," and being addressed "Mr. Lloyd L. Gaines, 1000 Moreau Drive, Jefferson City, Mo."

Mr. Redmond: Q. Why didn't you go to the University of Iowa,—to the Law School. A. Well, at the time I wrote them for a catalogue, I also wrote several other Universities and after comparing the catalogues, or, rather, the courses of studies offered, I decided that Missouri U. would give me more largely what I wanted than any other colleges under consideration.

Q. You preferred the Missouri University Law School to all others? A. Yes, I did.

Q. You stated that on August 19th, 1935, you applied to the Law School of the University of Missouri. Did you receive any communication from anyone there? A. Yes, I did.

Q. From whom? A. The registrar, Mr. Canada, sent me a catalogue, and urged me to have my transcript sent to the University, and told me that as soon as he received the transcript he would advise me relative to my application to the Law School.

Mr. Hogsett: May I make this suggestion: Why don't you just offer all the correspondence you have, in chronological order,—we will admit it. I think in this group of photostatic copies is a record of every bit of the correspondence.

Mr. Houston: We will take it out and look at it.

Mr. Hogsett: And here are the originals, instead of the photostatic copies, if you prefer them.

NOTE: Counsel for relator examined copies:

Mr. Hogsett: At the request of counsel, I produce photostatic copies of all the correspon-

dence back and forth between the relator, Gaines, and the University authorities or representatives. I am advised that this is a complete file and I am willing that they may use this if they desire, to shorten the time of separate identification of the letters one by one.

NOTE: The various photostatic sheets referred to were now marked by the reporter as Relator's Exhibits B, C, D, E, F, G-1, G-2, H, I, J-1, J-2, K, L, M, N-1, and N-2, respectively.

Mr. Redmond: I offer in evidence Relator's Exhibits B to N-2.

The Court: Admitted.

Mr. Redmond: I will read Exhibit B.

NOTE: Mr. Redmond now read Exhibits B, C, D, and E to the Court.

Mr. Hogsett: Mr. Redmond, will you admit in the record,—as you did in the opening statement,—that at the time of the letters thus far written by Mr. Canada, Mr. Canada had no way to know and did not know that the relator was a Negro? Will you admit that?

Mr. Redmond: Surely.

The Court: Very well. Let it be so admitted.

NOTE: Mr. Redmond read Exhibit F to the Court.

Mr. Redmond: I won't read Exhibits G-1 and G-2 which are a copy of the petitioner's transcript which was sent from Lincoln University to

the University of Missouri; but I will ask if you will stipulate that this transcript shows enough work having been done for admission,—all other questions being out of the case?

Mr. Hogsett: I think that is a fact, and we therefore admit it.

The Court: It is admitted that the transcript of the work done and the credit received at Lincoln University would be sufficient to admit him to the Law School.

Mr. Hogsett: Provided, he were otherwise eligible.

The Court: Very well.

NOTE: Mr. Redmond read Exhibit H to the Court.

The Court: Well, I don't see that you need to read all these letters, unless you want to. I will read them, myself.

Mr. Houston: They will all be copied in the record anyway,—that is all right.

Said Exhibit B to N-2, both inclusive, are in words and figures as follows, to-wit:

RELATOR'S EXHIBIT B

1000 Moreau Drive,
Jefferson City, Mo.,
June 12, 1935.

Registrar,
Missouri University,
Columbia, Missouri.
Dear Sir:

Please send me a copy of one of your current,
general catalogues.

Sincerely,

Lloyd L. Gaines

RELATOR'S EXHIBIT C

June 18, 1935

Mr. Lloyd L. Gaines
1000 Moreau Drive
Jefferson City, Mo.
Dear Sir:

I am pleased to learn that you are interested in work in the University of Missouri. Under separate cover, I am sending you a copy of our latest General catalog.

One deciding to enter the University should admits his credentials well in advance of the term in which he wishes to enroll so that his admission may be arranged.

Very truly yours

Registrar.

PH

RELATOR'S EXHIBIT D

Aug. 21 1935
3932 W. Belle Pl.,
St. Louis, Mo.,
August 19, 1935

To the Registrar,
Missouri University,

Columbia, Missouri.

Dear Sir:

I should like to enter the School of Law at Missouri University this fall. Please send me a formal application blank and complete information regarding fees and expenses.

Sincerely,

Lloyd L. Gaines

RELATOR'S EXHIBIT E

August 24, 1935

Mr. Lloyd L. Gaines

3932 W. Belle Place

St. Louis, Missouri

Dear Sir:

In response to your letter of August 19 I am sending you under separate cover a copy of the general catalog. Beginning on page 63 you will find information concerning fees and expenses.

You should have the registrar of the college or university which you have attended send me an official transcript of your record including a statement of your high school credits. When this is received I shall be glad to notify you regarding your admission to our School of Law.

If the catalog does not give you all the information you desire, please do not hesitate to write me again.

Very truly yours,

Registrar.

RELATOR'S EXHIBIT F

Gaines, Lloyd L.

3932 W. Belle Pl.,
St. Louis, Missouri.
August 27, 1935.

Aug. 28, 1935.

Registrar,
Missouri University,
Columbia, Missouri.

My dear Sir:

I am writing my college registrar today to mail you a copy of my transcript in order that I might enter the M. U. Law School.

—Lloyd L. Gaines

RELATOR'S EXHIBIT G-1

(Photo)

RELATOR'S EXHIBIT G-2

(Photo)

RELATOR'S EXHIBIT H

(Photo)

RELATOR'S EXHIBIT I

(REPORTER'S NOTE: Same appears on regular Western Union Telegram blank, the printed portions of which are not copied here.)

SEPTEMBER 18 1935

LLOYD L GAINES
3932 WEST BELLE PLACE
ST LOUIS MISSOURI

REGARDING YOUR ADMISSION TO LAW SCHOOL PRESIDENT FLORENCE AND MEMBER BOARD LINCOLN UNIVERSITY WILL CONFER THIS AFTERNOON IN JEFFERSON CITY ABOUT THE MATTER SUGGEST YOU COMMUNICATE WITH PRESIDENT FLORENCE REGARDING POSSIBLE ARRANGEMENTS AND FOR FURTHER ADVICE

PAID S W CANADA REGISTRAR
OFFICIAL BUSINESS UNIV MISSOURI
REGISTRAR'S OFFICE
UNIV MISSOURI

RELATOR'S EXHIBIT J-1 and J-2

SEP 27 1935
3932 W. Belle Place,
St. Louis, Missouri,
September 24, 1935.

President Walter Williams,
University of Missouri,
Columbia, Missouri.

My dear Sir:

For a long time prior to my graduating from Lincoln University, Jefferson City, Missouri, August 8, 1935, law was my choosen field for further study. Having graduated from Lincoln with the Bachelor of Arts degree in history, I selected Missouri University School of Law because of its particular emphasis upon Missouri law. Upon filing my application for entrance, however, Registrar S. W. Canada wired me to communicate with President Florence of Lincoln after his conference of September 18 with Dr. Elliff of the Lincoln university Board of Curators. President Florence said that Dr. Elliff advised him to call my attention to Section 9622 of the 1929 Revised Statutes of Missouri offering tuition to a school of any adjacent state carrying a graduate program of study parallel to the one offered by Missouri University.

President Williams, I am a student of limited means but a commendable scholastic standing. May I depend upon you to see that I am admitted to Missouri University, where I am sure of getting what I want at a cost that is most reasonable?

An immediate reply would be highly appreciated.

Very sincerely yours,

Lloyd L. Gaines

RELATOR'S EXHIBIT K

3932 W. Belle Place,
St. Louis, Missouri
September 24, 1935

Att. Geo C. Willson,
 Boatmen's Bank Bldg.,
 St. Louis, Missouri
 My dear Sir:

For a long time prior to my graduating from Lincoln University, Jefferson City, Missouri, August 8, 1935, law was my choosen field for further study. Having graduated from Lincoln with the Bachelor of Arts degree in history, I selected Missouri University School of Law because of its particular emphasis upon Missouri law. Upon filing my application for entrance, however, Registrar S. W. Canada wired me to communicate with President Florence of Lincoln after his conference of September 18 with Dr. Elliff of the Lincoln University Board of Curators. President Florence said that Dr. Elliff advised him to call my attention to Section 9622 of the 1929 Revised Statutes of Missouri offering tuition to a school of any adjacent state carrying a graduate program of study parallel to the one offered by Missouri University.

Att. Willson, I am a student of limited means but a high scholastic standing. May I depend upon you to see that I am admitted to Missouri University, where I am sure of getting what I want at a cost that is most reasonable?

An immediate reply would be highly appreciated.

Very sincerely yours,
 (Signed) LLOYD L. GAINES

RELATOR'S EXHIBIT L

Taylor, Chasnoff & Willson
St. Louis, Mo.

September 26, 1935

Mr. Lloyd L. Gaines,
3932 W. Belle Place,
St. Louis, Missouri

Dear Mr. Gaines:

COPY

Absence from the City has prevented an earlier answer to your letter of September 24th.

The matter of admission to the University is handled in the first instance by the administrative officers of the University, of which President F. A. Middlebush is the head. I suggest, therefore, that you take the matter up through these channels. If, subsequently, you desire the matter presented to the Board of Curators, I suggest that you communicate with the President of the Board, who is Senator F. M. McDavid, Woodruff Bldg., Springfield, Missouri.

Yours very truly,

(Signed) Geo. C. Willson

GCW:BC

RELATOR'S EXHIBIT M

TAYLOR, CHASNOFF & WILLSON
Attorneys and Legal Counselors
Boatmen's Bank Building
St. Louis

SEP 28 1935

Daniel C. Taylor

19-15-1935

Jacob Chasnoff

George C. Willson

Hugo Monnig

James V. Frank

Alex R. A. Garesche

J. H. Cunningham, Jr.

James S. McClellan

Lewis H. Carstarphen

Eric P. Newman

September 26, 1935

Honorable F. A. Middlebush, President,

University of Missouri,

Columbia, Missouri

Dear Mr. President:

Herewith copy of letter received from Lloyd L. Gaines regarding admission to the University, with copy of my reply.

Yours very truly,

Geo. C. Willson

GCW:BC

Encs.

RELATOR'S EXHIBIT N-1, N-2

March 31, 1936

Mr. Lloyd L. Gaines

3932 W. Belle Place

St. Louis, Missouri

Dear Sir:

The following resolution was adopted by the Board of Curators of the University of Missouri at a meeting held at the University, Friday, March 27, 1936:

"WHEREAS, Lloyd L. Gaines, colored, has applied for admission to the School of Law of the University of Missouri, and

"WHEREAS, the people of Missouri, both in the Constitution and in the Statutes of the State, have provided for the separate education of white students and negro students, and have thereby in effect forbidden the attendance of a white student in Lincoln University, or a colored student at the University of Missouri, and

"WHEREAS, the Legislature of the State of Missouri, in response to the demands of the citizens of Missouri, has established at Jefferson City, Missouri, for negroes, a modern and efficient school known as Lincoln University, and has invested the Board of Curators of that institution with full power and authority to establish such departments as may be necessary to offer to students of that institution opportunities equal to those offered at the University, and have further provided, pending the full development of Lincoln University, for the payment, out of the public treasury, of the tuition, at universities in adjacent states, of colored students desiring to take any course of study not being taught at Lincoln University, and

"WHEREAS, it is the opinion of the Board

of Curators that any change in the State system of separate instruction which has been heretofore established, would react to the detriment of both Lincoln University and the University of Missouri,

"THEREFORE, be it resolved, that the application of said LLOYD L. GAINES be and it hereby is rejected and denied, and that the Registrar and the Committee on Entrance be instructed accordingly."

This is to inform you that in accordance with the foregoing your application for admission to the University is rejected and denied.

Very truly yours,

S. W. Canada, Registrar

SWC:MB

Mr. Redmond: Q. On September 18th, Mr. Canada sent you a telegram advising you that President Florence and a member of the Board of Lincoln University would confer concerning your application. Did you get a letter from President Florence? A. Not immediately.

Q. Did you get a letter? A. Yes, sir.

NOTE: A paper was produced by counsel which was marked by the Reporter as Relator's Exhibit O.

Mr. Redmond: Q. I show you Relator's Exhibit O and ask you if this is the letter you received from President Florence? A. Yes, sir, that is it.

Mr. Redmond: I would like to offer it in evidence, Your Honor.

Mr. Hogsett: No objection.

The Court: Admitted.

Mr. Redmond read Exhibit O to the court, same being in words and figures as follows, to-wit:

LINCOLN UNIVERSITY

Founded as Lincoln Institute 1866
by the 62nd and 65th United States
Colored Infantry, and supported by
The State of Missouri

Jefferson City, Mo.
September 23, 1935

Office of

The President

Mr. Lloyd L. Gaines
3932 West Belle Place
St. Louis Missouri

Dear Mr. Gaines:

I wish to acknowledge receipt of your letter concerning the telegram received from the Registrar of the University of Missouri.

In reply I wish to state that the member of the Board of Curators referred to in the telegram is Dr. J. D. Elliff, president of the Board.

Dr. Elliff stated that he had been informed that you had made application for admission to the Law School of the University of Missouri. He asked me to call your attention to Section 9622.

of the Revised Statutes of Missouri, 1929, which reads as follows:

SEC. 9622. MAY ARRANGE FOR ATTENDANCE AT UNIVERSITY OF ANY ADJACENT STATE—TUITION FEES.—

Pending the full development of the Lincoln university, the board of curators shall have the authority to arrange for the attendance of Negro residents of the state of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the state university of Missouri, and which are not taught at the Lincoln university and to pay the reasonable tuition fees for such attendance; *provided* that whenever the board of curators deem it advisable they shall have the power to open any necessary school or department. (Laws 1921, p. 86, Sec. 7.)

If you desire to apply for aid under the provisions of the Statute quoted above, I advise you to write Mr. Lloyd King, State Superintendent of Schools, Jefferson City, Missouri.

Hoping that this is the information which you requested in your letter, I am

Sincerely yours,

(Signed) Charles W. Florence
PRESIDENT

SWF:JTI

Mr. Redmond: Q. What did you do after you got that letter? A. After receiving the

letter I waited a few days and then wrote the National Association for the Advancement of Colored People, regarding the matter.

Q. Did you decide to take advantage of the scholarship mentioned in the letter, or not? A. No, sir, I did not.

Q. Why not? A. Well, for several reasons, as I have already said; I had decided that Missouri U. offered the best course in Law,—more nearly what I wanted,—and, moreover, those scholarships, or otherwise known as tuition to out-of-state schools in the adjacent states, are not satisfactory, all the knowledge I had of them up to that time.

Q. Just tell us why they were not satisfactory. A. Well, in a number of cases I have seen letters to the effect that—

Mr. Hogsett: We object to hearsay. This was obviously hearsay. He can state his reasons, but to state letters from somebody else is hearsay.

The Court: He may state what he knows, but not what somebody else told him.

To which ruling of the Court the relator, by his counsel, then and there at the time duly excepted and saved his exceptions.

Mr. Redmond: Q. Have you any knowledge of your own concerning the administration of these out-of-state scholarships? A. I have no personal knowledge on that.

Q. Well, tell us why you wanted to go to the University of Missouri Law School,—what were your reasons? A. After looking over the dif-

ferent catalogues and studying the offerings of the different law schools, and seeing that Missouri U. was a very reputable law school,—that was the reason I wanted to come,—just because it is a very good law school, as advertised. Secondly, because it is cheaper to attend Missouri U. than to go out of state. To illustrate, total tuition in law at Missouri University, at \$4.00 for a credit hour, seventy-nine hours, would run \$316.00. The total tuition for the University of Iowa accounted at \$186.00 a year for three years would be \$504.00. That is a difference between Missouri U. and Iowa of \$188.00. The total tuition in Illinois U. for the three years course in law is \$450.00, or a difference of \$134.00. After glancing that over, I decided it would be cheaper to come here to Missouri U. Moreover, taking into consideration the facts of transportation and communication, and being here in Columbia, would be nearer home than any of the other places named, and if I wanted to make a fast trip home and back, the expense would not be as high, and it might be necessary at times to make that trip; and long distance calls by telephone would not be as expensive.

A third reason why I decided I would like to come to Missouri U. is that Missouri U. is the only law school within the state of Missouri that I am qualified to go to,—which I am qualified to attend. I wish to practice law here within the state of Missouri and by the advertisement in the catalogue of the University of Missouri, it emphasizes the fact that they publish a Missouri Law Review, and inasmuch as the editorial staff

of that Law Review is composed of students in the college, as well as the faculty members of the Law Department, and inasmuch as this Law Review is published for the state and its bar it emphasizes in a number of cases Missouri Law, and I thought it would be to my advantage to be in a school where Missouri Law came before the class room with sufficient frequency to give me some familiarity with the law where I would wish to practice, because it would undoubtedly be an advantage to know particulars about the law in your own locality rather than to always have to resort to research work. A case might depend on that because you might be in court when a technicality came up and you would not have time to look it up.

Q. Where do you intend to practice law?

A. St. Louis.

Q. Are you in a financial position to take care of the expense, the uniform expense required of students in the University of Missouri? A. Yes, sir, I am.

Q. And if you are admitted you will obey all the rules and regulations? A. Yes, sir.

Mr. Hogsett: At the request of counsel, respondents are willing to admit that if a tender of fees had been offered and made by the relator it would have been rejected by the respondents, for each and all the reasons asserted in their return to the alternative writ.

The Court: Let it be so admitted.

Mr. Redmond: Q. Does Lincoln University

have a Law School or a Law Department? A. No, sir; it does not.

Q. What departments does Lincoln University have,—Lincoln University at Jefferson City?

A. It has an undergraduate department leading to a degree in Education—

The Court: I suppose it will be admitted that Lincoln University does not maintain a Law School?

Mr. Hogsett: Yes, sir.

Mr. Redmond: Q. Is there any graduate work at Lincoln University? A. Not that I know of.

Q. Was there any when you were there? A. No, sir.

Q. Have you lost any time in preparing your self for your profession? A. Yes, I have.

Mr. Hogsett: We object to that as irrelevant. I don't know how ~~that~~ has any bearing on any issue here.

The Court: Well, he has answered, but I think the objection would be sustained. I don't see the purpose of it.

Mr. Redmond: Well, I want to except to the ruling and to make proof that if we were permitted to interrogate the witness along this line we would show that because of the refusal of the University of Missouri to admit Relator he has already lost one year of his life in the pursuit of his profession and the study of Law.

Mr. Hogsett: We object to the offer of proof as wholly irrelevant, but desiring that the relator have full opportunity to make his proof, knowing

that the court will receive that which is proper and reject that which is improper, we withdraw the objection.

The Court: Very well, the objection is withdrawn. Answer the question.

The Witness: A. Yes, I lost a year's time.

Mr. Hogsett: At the request of counsel for relator, the respondents admit that on January 24, 1936, this relator filed a mandamus suit in this court against S. W. Canada, Registrar, and we are willing that the Court may take judicial notice of the files in that case for the purpose of showing the nature of that case.

Mr. Houston: And after the answer of the Board of Curators on March 27th, that suit was dismissed by stipulation.

Mr. Hogsett: That is all right.

Mr. Cave: That action was dismissed by stipulation.

*Cross Examination of Lloyd L. Gaines
by Mr. Hogsett*

Q. You testified that you were born in Mississippi and came to St. Louis about ten years ago? A. Yes, sir.

Q. You named the schools in which you were educated in St. Louis? A. Yes, sir.

Q. You didn't name the grammar school you attended in 1926, or the Lincoln grammar school in 1927,—you attended those schools did you not?

A. Yes, sir.

Q. Those are all public schools of St. Louis.

in which you received free education? A. Yes, sir.

Q. They are all well managed and well operated colored schools? A. Yes, sir.

Q. That is also true of Lincoln University,—you found that to be a well managed high grade institution, with a high level of instruction and scholarship training, and consequently on a level with that of Missouri University—is that true?

A. I would like to qualify my answer on that.

Q. Well, you haven't made any yet,—what is your answer? A. I do not think that Lincoln University is what you would call a very high rating school. In a number of cases a student's graduation has been delayed because he could not get the course he wanted when he wanted it, and at other times he could not get the course at all and would have to substitute anything else just to fill in hours.

Q. Do you remember when your deposition was taken in this case on the 27th of May, this year? A. Yes, sir.

Q. In St. Louis. At that time you testified that "I found Lincoln University to be a well managed, well conducted University and on a plane with Missouri University, as far as my knowledge goes," didn't you? A. May I see that, please?

Q. Yes, sir, page 73. (Showing witness deposition.) Beginning on page 72: "Question: You did avail yourself of education at Lincoln University and went through that University with the required course of study leading to the A. B. degree? Answer: Yes. Question: You

found it to be a well managed, well conducted University, did you not? Answer: Yes. Question: And on a plane with Missouri University, as far as your knowledge goes? Answer: Yes." You testified that way, didn't you, A. Yes, sir.

Q. Was that testimony true or untrue? A. That testimony I would like to have interpreted in the light of the statement I have just made.

Q. Just answer, then you may qualify it as you please. Was the testimony you gave in St. Louis on May 27th, and which I have just read, true or untrue? A. Yes, it was true at that time.

Q. Now you may qualify, in the light of your former answer,—is that what you want? A. Yes, sir. Now that statement was true in the sense that Lincoln University is a well managed and well conducted University so far as it goes, and whether it is on—so far as I know it may be on a plane with Missouri University in its standards. But I said a moment ago that I would not call it a first rate University because you could not at all times get what you wanted. That is the difference in my statements.

Q. The only criticisms in this respect that you have to offer is that the curriculum there was not as broad as may be in other schools where they have a wider course of study,—is that what it boils down to? A. Well, it would not be a very high type of school.

Q. But, in the courses that they did give you found it to be a well conducted, well managed

University, and on a plane with Missouri University as far as your knowledge goes with respect to the courses they did offer? A. Yes, sir.

Q. That statement you are willing to make unqualifiedly aren't you? A. Yes, sir.

Q. Very good. Now from your experience as a student in the public schools of Missouri, grammar schools, one or two High Schools, College,—Lincoln University,—all of which were colored schools, you understood it was the public policy, law and constitution of Missouri to separate the Negro and white children for the purposes of education? A. Yes, sir.

Q. Now you also knew that Lincoln University was established for colored young men and women and Missouri University was established for and attended by white young men and women,—you knew of that grouping when you made your application? A. Yes, sir.

Q. You never have seen at Lincoln University a white student, have you? You knew it was an exclusively colored school, common sense told you? A. I don't exactly agree with that,—I don't know that is exclusively colored.

Q. Did you ever see a white student there? A. I cannot be sure.

Q. You mean the color of certain students was such you could not be sure whether they were white or colored,—is that what you mean? A. Yes, sir.

Q. Very good; but you do understand, and common sense and three years' experience told you that it was a colored University? A. Yes, sir.

Q. You knew that? A. Yes, sir.

Q. And have you ever seen a colored student in Missouri University? A. No, sir.

Q. Now with that knowledge and that experience,—fifteen years of it,—you nevertheless made application for enrollment in Missouri University, didn't you? A. Yes, sir, I did.

Q. And you got a letter dated September 23rd, 1935, from President Florence specifically calling your attention to the statute, and to your rights thereunder, didn't you? A. Yes, sir.

Q. Now you say that, having gotten that letter, you then wrote to the National Association for Advancement of Colored People? A. I said some days after having received it.

Q. About how long? A. May I have the date on that letter?

Q. Yes. (Handing witness a paper.) A. Well, it was the latter part of September.

Q. This letter is also the latter part of September. About how many days elapsed? A. About a week.

Q. Have you the date? A. I don't think I have.

Q. At the time of taking the deposition, you thought it was the 27th of September. A. Somewhere along there.

Q. Within two days after you got this letter calling your attention to your rights under the Missouri statute, you were in communication with the N. A. A. C. P.? A. Yes, sir.

Q. What is the N. A. A. C. P.? A. I don't believe I understand your question.

Q. What do the initials stand for? A. National Association for the Advancement of Colored People.

Q. You understood what this telegram meant that you got on the 18th of September from Mr. Canada, and you understood the language of the law, and your rights under it, when you got the letter from President Florence, didn't you? A. Yes, sir, as a layman.

Q. Now with that full knowledge, after a full grasp of the meaning of the Law and your rights under it, you deliberately, and after the advice of counsel, chose not to avail yourself of those rights, didn't you? A. I don't believe that I could answer that "Yes" or "No"—You said "with full knowledge of the law." That is what I am trying to get into school to get. I am not sure I had a full knowledge of the Law.

Q. In your deposition, at page 87, did you say this: "Question: You showed at the time you wrote that letter that you had made some study of the provisions of Section 9622, giving you the right to have an education in the Law, in an adjacent state,—you had made that study of the Section of the Law so authorizing? Answer: Yes, sir. Question: And you shew a very clear grasp of its provisions,—so you fully understood it, didn't you? Answer: Yes, sir. Question: With that full grasp of its meaning, you have deliberately, and after consideration and advice of counsel, chosen to refuse to avail yourself of any of those rights? Answer: I have." A. Yes, sir.

Q. Was that testimony true or untrue.
A. That testimony was true. May I qualify it?

Q. Certainly. A. Your question was that I had received a very clear grasp of the meaning of the statutes,—

Q. Didn't you? A. My answer was "Yes." Very well. Now you say, "With that full knowledge"—I interpret that to mean with the full knowledge and grasp that I had of it—

Q. Well, I think you are now engaging in a play upon words, Mr. Gaines. I don't mean to do that. I am trying to be plain with it. You understood it, Mr. Gaines,—that is the statute that is quoted in this matter,—you understood it because it is there within the four corners of that letter. You knew that? A. I believe I understood it.

Q. You knew you had certain rights under the 1921 Statute creating Lincoln University, didn't you? A. Yes, sir, it is in the statutes.

Q. You talked those rights over with these gentlemen now representing you and they advised you not to avail yourself of those rights, but to bring this suit? A. No, sir.

Q. You say they didn't? A. No, that is my idea,—about this suit.

Q. Did you discuss the question of your rights under the 1921 statute with these counsel?

A. Yes, sir.

Q. Did they advise you to apply to Lincoln University for those rights, or not to apply?

A. They did neither.

Q. They didn't advise you one way or the other, do you mean? A. That is right.

Q. On the contrary, didn't you testify in your deposition that they advised you to keep corresponding with Missouri University? A. I did.

Q. And they did that? A. Yes, sir.

Q. Thereby impliedly advising you not to avail yourself of the rights given you by the 1921 statute,—is that true? A. Admitted.

Q. Now you never at any time made an application to Lincoln University or its Curators or its officers or any representative for any of the rights, whatever, given you by the 1921 statute, namely, either to receive a legal education at a school to be established in Lincoln University or, pending that, to receive a legal education in a school of law in a state university in an adjacent state to Missouri, and Missouri paying that tuition,—you never made application for any of those rights, did you? A. No, sir.

Mr. Houston: I think counsel should agree in this regard: That the Acts of 1921 was amended in 1935,—the state does not pay the tuition now but all it pays is the differential.

Mr. Hogsett: That is a law question. We will present that at a later time. The unqualified duty is laid down in the 1921 statute that the Board of Curators of Lincoln University shall pay all the tuition. The appropriation act of 1935 appropriating enough money to pay the excess that these foreign states would charge over the fees a resident would pay in Missouri, cannot change the duty upon the Lincoln Board of Curators to pay the full tuition. That is a law ques-

tion and we will meet him on that at a later time. My question now is whether he ever sought by any means, express or implied, or made any request or suggestion to Lincoln University for any of the rights given him by the 1921 statute. That is certainly a competent—

Mr. Houston: That is all right.

Mr. Hogsett: Q. Your answer is that you never did,—that is true, isn't it? A. Yes, sir.

Q. Now you said you had made some inquiry as to the courses of instruction you would have received in the Universities of Iowa and Illinois?

A. Yes, sir.

Q. At the time your deposition was taken on May 27th of this year, you recall I asked you what was the system of instruction in the Missouri University Law School, Iowa Law School, Illinois Law School, and you didn't know,—is that true?

A. Yes, sir.

Q. You didn't then know whether the case book system or the text book system or the lecture system or what system was used at any one of those schools, did you? Just answer that question and then you may qualify. A. I would like to qualify it.

Q. The fact is that you didn't then know? A. Yes, sir.

Q. Or do you know? A. The fact is that I did not then know.

Q. Now you may qualify. A. Now your question was, whether in looking over those catalogues I had seen a statement about what system

was used, and I told you I did not see any such statement and, consequently, I didn't know.

Q. That is a fair statement of what you said. So at the time you made this election,—that is the point to this,—at the time you were making this election that you say you made, as between Missouri and these adjacent states, you didn't actually know what the system of instruction was in either school, did you? A. No, sir. But may I qualify that again?

Q. Yes, go ahead. A. It was not given in the catalogue and I had not been to those Universities and consequently did not know the manner of instruction.

Q. You are mistaken about that, are you not,—because do not all the catalogues of all the various schools give the case books used in the various courses? A. Not that I know of.

Q. Well, we will prove that they do when we offer our evidence.

The Court: Well, don't comment. Let's get along.

Q. At a certain page in the Bulletin of the College of Law of the University of Iowa you read that "the primary purpose of the school is to prepare students for the general practice of law in any jurisdiction where the system of Anglo-American law prevails,"—didn't you? A. Yes, and the continuation of the same paragraph says that special attention would be given to the needs of the residents of Iowa, for the practice of Law within Iowa.

Q. Now you know that the Negro is admitted

Q. Does the Missouri Law Review pay particular attention to Missouri law? A. Not necessarily. I might say this,—that we have articles of a general nature and we have some articles with special reference to Missouri law, but I would hate to say, or hesitate to say that we would pay particular attention to the Missouri law.

Q. Isn't it the policy that in every issue of the Missouri Law Review you have one leading article on Missouri Law? A. We have had, so far, one leading article on the Missouri law. It does not follow that future articles, or future issues will have such an article.

Q. May I show you? (Handing witness two copies of Missouri Law Review). As a matter of fact there has been one leading article each issue of the two issues of the Missouri Law Review on Missouri law, is that not right? A. Right.

Q. Were you at the School of Law when the catalogue of announcements for 1935-1936 was issued? A. Yes.

Q. I call your attention to the announcement there,—and I ask that this be introduced as our Exhibit Q, page 226— May I ask if you remember seeing that announcement about the Missouri Law Series? (Indicating) A. Yes, I have seen this.

Q. And in your position as Dean, no announcement would go out into the catalogue from the School of Law without your official approval,—is that right? A. That is right.

Q. Now may I have that a second, sir? (Receiving Exhibit Q from witness) May I read this to the court? (Reading)

"The School of Law publishes the Law Series of the University of Missouri Bulletin. The purpose of this publication is to present to the Missouri Bar the results of legal study and research in the field of Missouri law carried on at the School. The Series is edited by the faculty and a board of student editors chosen by the faculty from the members of the second and third-year classes. Student editors are chosen on the basis of legal scholarship. Election to the board is an honor and a student editor has an unusual opportunity to gain experience in legal research, which should better fit him for the practice of law.

"Each number of the Series contains at least one leading article on some phase of Missouri law written by a member of the faculty and notes on recent Missouri cases, written by student editors under the direction of a member of the faculty." (Exhibit Q, page 226).

That was the official policy of the Missouri Law Series, was it, during the time of your Deanship?

A. Yes, I made a mistake, several numbers were published of the old Series during my first year here, and I cannot say whether or not that was a policy. It is true that the statement appears in the catalogue, but I did not discuss it with the faculty nor was there any discussion of the old Law Series while I was Dean of the Law School. That is a statement that appears there without

in Kansas, Nebraska, Iowa and Illinois Universities? A. Well, I don't know it, but I had it on hearsay.

Q. Well, you have investigated at least two of them,—you know that Negroes are admitted in Iowa and Illinois. A. I have had it told to me. I have not applied there.

Q. And you know by inquiring they are admitted in Kansas and Nebraska,—universities. A. Yes.

Q. You know that all those law schools receive students who are non-residents of those respective states,—you know that, don't you? A. Yes, sir.

Q. At page 69 of your deposition, do you recall my asking you if a good law school were established at Lincoln University, one that would be on a par with that at Missouri University, whether you would attend it, and you refused to answer,—didn't you? A. Yes, sir.

Mr. Redmond: I would like for the record to show that he was instructed not to answer the question because it was a waste of time to answer to something that did not exist, and until they have one he does not know what he would do.

Mr. Hogsett: He says he would refuse to answer it.

Mr. Redmond: Would you read the deposition on that particular point?

Mr. Hogsett: Yes, sir. (Reading) "Question: Now, taking those up one at a time, your first reason was that there is no law school in Lincoln University,—that is true at this time. If there

was a law school in Lincoln University, would you then prefer to go there? Mr. Redmond: I want to object to that, and instruct him not to answer; there is no law school at Lincoln University, and it is a waste of time in dealing with what he would do if something would happen.

Mr. Hogsett: You refuse to answer the question, do you? Answer: Yes. Mr. Redmond:

For the reason there is no telling what kind of a law school would be there,—it might be an inferior law school. Mr. Hogsett: Assuming it was a good one?

Mr. Redmond: I want to say that I object to that question because it is based on something that does not exist. Mr. Hogsett:

I am asking the question and the witness can answer it or not, as he pleases. Mr. Redmond: I

am going to instruct him not to answer it. Answer: I decline on advice of counsel."—That is your evidence, is it? A. Yes, sir.

Q. And that is still your position, isn't it; or isn't it?

Mr. Redmond: The way for him to find out is to ask the question, and we can make our objection and Your Honor can rule on it.

The Court: Objection sustained.

Mr. Hogsett: All right: Now in regard to this matter of travel,—you say, living in St. Louis, that you would have to travel further to get to Iowa City, Champaign, Illinois; Lincoln, Nebraska; or Lawrence, Kansas;—and that is true,—but do you not know that there are many towns in the state of Missouri where the distance to Columbia is further and the expense of reaching Columbia

is greater than it would be for you to go from St. Louis to these other towns in foreign states?

Mr. Redmond: We object to that. That has no bearing on the case, and is immaterial.

The Court: I can't tell about that. If he knows, he may answer.

To which ruling of the Court the relator, by his counsel, then and there at the time duly excepted and saved his exceptions.

The Witness: A. I would like to say yes, and qualify that.

Mr. Hogsett: Q. Go ahead. A. Although some students attending Missouri University may have to travel further than I would have to travel to go out of state, they are not compelled to travel that distance, are they? At least, they can cross the border and enter a college that is nearer to them than Columbia, Missouri, is.

Q. I am not asking you to argue it, but I am asking for the fact,—if you don't know that white students living in Missouri may travel and do travel further to get to Columbia than you would travel to go from St. Louis to these adjacent states.

Mr. Houston: Counsel has been arguing with the witness all along. It is unfair to argue with the witness and then tell the witness he can't argue back.

The Court: Well, don't comment one way or the other. Ask the question, and let him answer.

The Witness: A. Yes, sir.

Mr. Hogsett: Q. You know you are eligible from a scholastic standpoint and otherwise

to enter the Law School of Kansas, Iowa, Nebraska or Illinois? A. Yes, sir.

Q. And you know those states are— A. Yes, sir.

Q. Adjacent to Missouri? A. Yes, sir.

*Re-direct Examination of Lloyd L. Gaines by
Mr. Redmond*

Mr. Redmond: Q. Mr. Gaines, did you believe that Negroes were barred from attending the Law School of the University of Missouri? A. No, sir; I did not.

(Witness excused.)

W. E. MASTERSON, having been duly produced, sworn and examined as a witness on the part of the relator, testified as follows, to-wit:

*Direct Examination of W. E. Masterson
by Mr. Houston*

Q. Please state your full name. A. William Edward Masterson.

Q. Dean Masterson, your occupation is Dean of the School of Law of the University of Missouri,—that is right? A. Yes, sir.

Q. What is your legal training,—you graduated at the University of Texas, and did you take a doctorate? A. I took a Bachelor of Arts degree at the University of Texas; at Harvard University, Master of Arts, Bachelor of Laws, and Doctor of Juridical Science; and at University of London, Doctor of Laws.

Q. At Harvard University, Negroes were admitted? A. They were, in the Law School. I

can speak only of that, that is, when I was there.

Q. How long have you been at the University of Missouri? A. Two years.

Q. Two? A. Yes, sir.

Q. That is the only publicly supported Law School in the state of Missouri,—is that right?

A. I don't know that I can answer that question.

Q. How many law schools are there in the state of Missouri? A. I cannot answer that question.

Q. But this University of Missouri School of Law is a publicly supported law school, as a part of the University of Missouri,—is that right?

A. It is.

Q. A member of the Association of American Law Schools, and is on the approved list of the American Bar Association? A. It is.

Q. Tell us, will you please, some of the requirements that a law school has to meet in order to get into the Association. A. The students entering a member school must have at least two years of pre-legal work; that school must maintain a staff of instructors, of full-time instructors, at least four in number.

Q. It must have a library of 12,500? A. That is right. They must have a library,—is it ten thousand—

Q. It used to be ten. A. I believe that you are right. They must spend at least \$1,500 a year on the library of 10,000 over a period of five years.

Q. They must have the reports,—of its own

jurisdiction and at least half the states, with codes and statutes?

Mr. Hogsett: This is all interesting from the standpoint of criteria of membership in that organization but has no bearing on the issue here of whether the State of Missouri has denied to the relator the equal protection of the law.

The Court: I will let him answer.

The Witness: A. I cannot answer without refreshing my recollection.

Mr. Houston: Q. Well, assuming that it is true that a law school has to have four full time teachers, it has to have a plant, does it not, where those teachers may have studies and where they give instruction, accessible to the students, and the library must be suitably housed? A. If you mean a place to keep the books; yes, sir.

Q. And a place where the instructors may study and be available to students for advice,—that is the basis of full time teaching? A. I suppose so. Then the instructor should give his full time to that type of work.

Q. What is the budget of the University of Missouri Law School, per year? A. I should have to refresh my recollection on that. I can't answer your question.

Q. What will be necessary for you to refresh your recollection? A. I suppose access to the records in the Business Department of the University.

Q. Can you do that,—so we can excuse you and call you back, later? A. I suppose I can.

Mr. Houston: May we reserve further ques-

tioning on those specific points,—because, I can assure Your Honor, we are not taking up time but since the Dean was the expert, or should be so regarded, I thought we could best get the information from him.

The Court: You can recall him, if you want to.

Mr. Houston: Thank you. I would like to show you a catalogue, Dean Masterson, and ask you if this is the official catalogue of the University of Missouri? (Showing book to witness.)

A. Yes, I take it to be.

Q. Will you turn to the section on the Law School? A. Announcements for 1936-37. I have it.

Q. In there that says that the function of the Law School is to prepare—well, so far as you know, has there been any change in the statements in the catalogue?—because I haven't seen the latest one. A. Well, as far as I know,—there are probably some slight changes in the curriculum, but very slight and immaterial.

Q. But not in the ordinary explanatory statements? A. None.

Q. Turn to the point of "Aims of School." A. Yes, sir.

Q. (Reading) "The School of Law exists to serve the state and its bar." A. Yes, sir.

Q. (Reading) "The primary aim is to equip students for the practice of law." Then reading on down, (reading), "The School recognizes a duty to the state beyond the equipment and training of practitioners. Many of the University students

who do not intend to practice find its courses valuable training for citizenship, for business careers, and for the service of the public on Commissioners and in the Legislature. The School attempts to serve the bar of the state by the publication of the Law Series of the University of Missouri Bulletin, hereinafter described." A. You must be reading from an out-dated publication. Have you the 36-37 announcement there?

Q. I have not. A. Well, it should be "Law Review" and not "Law Series."

The Court: Why not introduce that in evidence?

Mr. Houston: We would like to introduce as Petitioner's Exhibit P the catalogue of the University of Missouri, Volume 37, Number 7,—the section dealing with the School of Law, pages 222 to 227.

The Court: Let it be admitted.

Said Relator's Exhibit P, pages 222 to 227, both inclusive, is in words and figures as follows, to-wit:

The portions of pages 222-227 of Relator's Exhibit P, so offered in evidence, are as follows:

The School of Law was organized in 1872. It has been a member of the Association of American Law Schools since the latter's organization, is on the list of law schools approved by the Council of the Section on Legal Education and Admission to the Bar of the American Bar Association, and is the only such school in the state outside of the City of St. Louis.

LIBRARY: The law library contains approximately 35,000 volumes, and includes both the original and the reprints of the English reports; the Irish, Scotch, and Canadian Reports; several sets of the reports of the Supreme Court of the United States; the reports of all of the Federal courts, all of the state reports, full sets of the National Reporter System; the necessary digests, and a valuable collection of statutes, sessions laws, standard treatises, legal periodicals, and encyclopedias.

The library is in charge of a trained librarian, and is open to students from 8 o'clock in the morning until 10 o'clock at night.

AIMS OF SCHOOL

The School of Law exists to serve the state and its bar. The primary aim is to equip students for the practice of law. To this end, its methods conform to the most modern standards of legal education. Written examinations are given in all courses at the end of each course. Regular attendance is required at all class exercises.

The School of Law does not seek merely a large number of students, and the entrance requirements are such as to admit only those whose education and maturity fit them for serious study. Also, the School recognizes a duty to the state beyond the equipment and training of practitioners. Many of the University students who do not intend to practice find its courses valuable training for citizenship, for business careers, and for the service of the public on Commissions and

in the Legislature. The School attempts to serve the bar of the state by the publication of the Missouri Law Review, hereinafter described, and by preparing annotations to the Restatement of the Law by the American Law Institute as well as in other ways.

ADMISSION

PRELIMINARY TRAINING: The requirements for admissions are the satisfactory completion of (1), a four-years' high school course, or its equivalent, and (2), the completion of one-half of the work, exclusive of correspondence work, acceptable for a Bachelor's degree granted, on the basis of a four-year period of study, by the University of Missouri or any college or university accredited therewith. The Association of American Law Schools, of which this Law School is a member, interprets this requirement to mean that a candidate shall present at least 60 semester hours (or their equivalent) of college work taken in an accredited school and exclusive of credits earned in such courses as non-theory courses in Military Science, Hygiene, Domestic Arts, Physical Education, Vocal or Instrumental Music.

CURRICULUM—DEGREE

Three-Year Curriculum: The curriculum of the School of Law extends through three school years of two terms each. In order to be graduated, a student must have completed, with passing grade, seventy-nine (79) hours of law work. The

work of the students will normally be distributed as follows: Twenty-nine (29) hours in the first year, twenty-five (25) in the second, and twenty-five (25) in the third.

MISSOURI LAW REVIEW

The School of Law publishes the Missouri Law Review, a new publication which supersedes the Law Series of the University of Missouri Bulletin. The purpose of this publication is to present to the Missouri Bar and the legal profession in general the results of legal study and research carried on at the School. The Review is edited by the faculty and a board of student editors chosen by the faculty from the members of the second and third-year classes. Student editors are chosen on the basis of legal scholarship. Election to the board is an honor, and a student editor has an unusual opportunity to gain experience in legal research, which better fits him for the practice of law.

Each number of the Review contains leading articles written by members of the faculty and others, and notes on recent Missouri cases and comments written by student editors under the direction of members of the faculty.

Mr. Houston: Q. What is the proportion of Missouri students among the student body in the School of Law? A. I shall have to answer that approximately, and I only recall this,—that last year,—that is, the year before the academic year that has closed,—we had some 24 students from

other states, out of an enrollment of approximately 200. I haven't the figures for this year.

Q. So that the student body is predominantly made up of Missouri students? A. In that proportion I named, for the last year only.

Q. According to your knowledge, do the majority of students graduating from the University of Missouri settle in the state of Missouri, either for the practice of Law or other professions? A. I would say that the majority do, yes; but some of them go to other states for their practice.

Q. But the majority of them remain in Missouri? A. Probably they do, I would say; but I have no statistics on that.

Q. You are simply giving your general opinion? A. Yes.

Q. In view of that fact, in the School of Law you pay particular attention to Missouri decisions and Missouri law, do you not? A. We do not.

Q. The School publishes the Missouri Law Review, does it not? A. It does.

Q. What preceded the Missouri Law Review? A. The Missouri Law Bulletin, I think was its title.

Mr. Redmond: Law Series.

The Witness: A. Yes, Law Series.

Mr. Houston: Q. Does the same editorial policy run through the Missouri Law Review as through the Law Series, as to paying particular attention to the law of Missouri? A. I cannot say. I had nothing to do with the Missouri Law Series.

any particular reference to faculty action, I should say, but I am willing to say that the issues of the Series that were published while I was here, as I now recall it,—no, I can't say that,—we published three issues last year. Two of them, at least, have no articles on Missouri law. The third one, I don't recall its content. I don't know whether there was a leading article on Missouri law or not, but two of them had no leading articles on Missouri law.

Q. You are not talking about the year just closed? A. No, the one before the one just closed. These (indicating Law Reviews) came into being this year.

Q. But they do have recent cases, comments and notes in recent cases? A. Some Missouri cases, and some not Missouri cases.

Q. I ask you to look at the notes and case comments in the Missouri Law Review and tell us how many of these comments or notes there are not on Missouri cases or on cases of the United States Supreme Court. A. I will have to go through here (looking through Law Review). First, here is a comment which has nothing to do with Missouri Law,—“Constitutional Law—Regulation of the Price of Milk in Interstate Commerce.”

Q. That is United States Supreme Court, New York milk case? A. Yes, sir, right. The second case comment, beginning at page 68, has nothing to do with Missouri law,—“Constitutional Law—Delegation of Legislative Authority,”—a general constitutional law problem dealing with

the decisions of the Supreme Court of the United States.

The Court: Are you offering these Law Reviews in evidence?

Mr. Houston: Yes, I am going to offer them in evidence.

The Court: Well, offer the Reviews,—it is all before the Court.

Mr. Houston: Well, let me offer them in evidence and the Court will analyze them.

Mr. Hogsett: No objection.

Mr. Houston: We offer the Missouri Law Review, Volume One, Number One, as Relator's Exhibit R. And Volume No. Two as Relator's Exhibit S. If counsel will, at recess, go over them with us—

Mr. Hogsett: I am glad to co-operate with counsel to reduce the size of the record, but I will not, myself, have time to do that. If he will do that with some representative of Dean Masterson, that will be satisfactory,—during the lunch hour.

Mr. Houston: That is all right.

Mr. Houston: Q. Now tell us about the student editors of the Missouri Law Review, who the announcement says, are chosen on the basis of scholarship. A. Tell you about them?

Q. How are they chosen? A. The highest ranking men from the second and third year classes are chosen. We chose, this year, from those two classes seventeen students because they had the highest ranks in those two classes,—those two classes consisted of some 110 or 112 men. Seventeen of them were chosen, approximately

eight from either class. I would have to check that. If you want that information, I can give it to you.

Q. No. A. Well, it is purely on the basis of scholarship.

Q. A student of the School of Law of the University of Missouri, on the basis of high scholarship, does have a chance to do editorial work, if selected by the faculty on the basis of his scholarship? A. Yes, he writes case notes and comments.

Q. If the statement is true in the 1935 catalogue to the effect that "each number of the Series contains at least one leading article on some phase of Missouri law written by a member of the faculty, and notes on recent Missouri cases, written by student editors under the direction of a member of the faculty"—at least those students who are on the Missouri Law Review do get special work in Missouri law,—is that right? A. It does not follow at all that they have to or that they will. A student can select the case from any jurisdiction he wants, and write his note or comment under that case.

Q. But if the statement in the catalogue is true, that it contains notes on recent Missouri cases written by student editors, the student writing notes on the Missouri cases gets the benefit of special research and coaching and consultation with the faculty on the Missouri law? A. If he is writing on Missouri law he will have to make some study of Missouri law, but it does not follow that each student is confined to Missouri law. Very

frequently, in writing, a student in preparing a note on a Missouri case will tell you more about the law of other jurisdictions than he will tell you about the law of Missouri.

Q. Would the student get special work in that regard? A. His analysis is individual to that case; yes, sir.

Q. Then the students do get special work in Missouri law?

Mr. Hogsett: We object to that as repetition.

The Court: Let him answer. I am disposed to make this record full. Proceed.

The witness: A. I can only answer your question as to what he does, and whether he gets special training in that work in Missouri law is a matter of interpretation.

Mr. Houston: Q. I hand you here Volume one, Number One, of the Missouri Law Review and ask you to look at the recent cases and see if there is not quite a thorough analysis in foot notes and citations of Missouri cases,—in the several foot notes?

(Counsel indicating page 78 to witness.)

Mr. Hogsett: That is in evidence and speaks for itself.

The Court: Yes.

To which ruling of the Court the Relator, by his counsel, then and there at the time duly excepted and saved his exceptions.

Mr. Houston: Q. That note was prepared by a student editor so far as you know, was it not?

A. Here are references to a Pennsylvania case, Iowa, Illinois, A. L. R.—

Q. Well, not to interrupt you,—we understand that in writing a case note you cite laws of other jurisdictions, but the question is as to the amount of Missouri citations. You say "the School attempts to serve the bar of the state by the publication of the Law Series of the University of Missouri Bulletin, hereinafter described" in your announcement for 1935-1936. You say here in the 1936-1937 catalogue that "the School attempts to serve the bar of the state by the publication of the Missouri Law Review, hereinafter described, and by preparing annotations to the Restatement of the law by the American Law Institute, as well as in other ways." In preparing the annotations to the Restatement of the law, you are preparing Missouri annotations, are you not?

A. That is right.

Q. That is a special service of the University of Missouri Law School for the Missouri bar?

A. It is primarily for the Missouri bar, but those annotations have a wide distribution throughout the country.

Q. But it is primarily for the Missouri bar?

A. That is right.

Q. And therefore the statement that "the School attempts to serve the bar of the state by the publication of the Missouri Law Review" requires you to pay special attention to Missouri law?

A. No, that statement means we expect most of our subscribers to come from the Missouri bar. The leading articles are read and commented on by lawyers and Professors of Law throughout the country.

Q. Now let us go into the distribution of your student body. You take students from other states? A. Yes, sir.

Q. White students from other states? A. Yes, sir.

Q. Do you admit foreign students? A. I think so. We have none in the Law School, but I think we admit foreign students. I don't know why we do not,—but you will have to get that information from the Registrar. He has to do with admission in the Law School altogether.

Q. You don't raise any question as to how far they have to come from their home to the School of Law at the University of Missouri?

A. The Registrar has exclusive jurisdiction in that matter. I have nothing to do with it.

Q. Do you know whether there is any rule which attempts to determine how far a student has to come in trying to matriculate in the School of Law at the University of Missouri. A. I know of no such rule at all.

Q. Do you know of any other publicly supported Law School in Missouri? A. Well, I don't know of any.

Q. Two other questions: The work which you are doing, which the University of Missouri School of Law is doing, in making the annotations to the Restatement of the law,—the annotations on Missouri cases are not being duplicated anywhere else in the country? A. I would be surprised if it is.

Q. To the best of your knowledge, your

answer is "No"? A. Yes,—but I have no knowledge on the subject, as a matter of fact.

Q. You have a familiarity with current legal periodicals? A. Yes, sir.

Q. Do you know of any other periodical which contains as many cases on Missouri law as the Missouri Law Review, or Law Bulletin? A. I haven't examined it with special reference to that subject, and I can't answer that, but—I can't answer that question.

Cross Examination of W. E. Masterson

Mr. Hogsett: Q. The work of preparing annotations to the Restatement of the law by the American Law Institute is not done by students, is it? A. It is not. It is done by the faculty.

Q. They haven't a thing to do with it? A. No, except the faculty may call in student help and pay on an hourly basis. But that is purely mechanical help.

Q. If Mr. Gaines were a Freshman law student he would not be eligible for the Law Review board because only men from the second and third year classes are eligible? A. He would not be eligible until at the beginning of the second year.

Q. And it is speculative as to whether he or any other student would ever make the grade to qualify for work on the Missouri Law Review? A. That is right.

Q. Copies of the Missouri Law Review are sent all over the country? A. Yes, sir.

Q. To the Law Schools of Iowa, Kansas, Illinois and Nebraska? A. Yes, sir.

Q. And they are available for use there by

anybody who wants to see them? A. That is right.

Q. Each of those schools,—Kansas, Illinois, Iowa and Nebraska,—has a Law Review, and students on the basis of scholarship are eligible to work on those? A. Iowa, Nebraska and Illinois have Law Reviews but I don't think Kansas has. I would have to refresh my recollection to make sure of that,—as to Kansas having a Review,—but I don't think they have.

Q. Mr. Houston asked you whether Missouri University specializes in Missouri law and procedure, and you answered that it did not. What is the fact with respect to the type of education given by the University of Missouri Law School? A. We teach the general common law system as practiced throughout the United States.

Q. Is the Missouri Law School in any sense a provincial Law School, adapted primarily to educate lawyers who will practice only in this state? A. It is not.

Q. Is it not the aim of the school, as well as other modern law schools, to give work or education in the law which will give the student a basis for the practice of Law in any other state where the Anglo-American system of law obtains? A. It is.

Q. The case book system is used at Illinois, Nebraska, Kansas, Iowa and Missouri? A. That is right.

Q. The case books which the students study in those five schools are largely the same? A. Yes, sir.

Q. Have you at our request made a tabulation, showing as to each case book used in the Missouri Law School in all three years, the total number of cases included, and the total number of Missouri cases included? A. I have.

Q. I hand you these three tabulations and you may for the present purpose ignore the adding machine slips attached, and ask you to state whether they are the tabulations you have last referred to? A. Yes, sir, that is right.

Mr. Hogsett: I ask the Reporter to mark them as Exhibits, and I offer them in evidence.

NOTE: Said tabulations were marked as Respondents' Exhibits One, Two, and Three, respectively.

Said Exhibits 1, 2 and 3, respectively, are in words and figures as follows, to-wit:

(Exhibits omitted by agreement as material is covered in summaries.)

Mr. Hogsett: Q. Do these three tabulations include every case book used in the Missouri Law School in any year? A. They do.

Q. They are complete, then? A. They are.

Mr. Hogsett: Without taking time to read those, I have had prepared a summary of those, which I now offer in evidence, and they are subject to counsel's examination,—we know they are correct.

The Court: Do you accept that?

Mr. Redmond: Yes.

The Court: Let them be admitted.

NOTE: Same were marked by the Reporter as Respondents' Exhibit 4, 5 and 6, respectively; were read to the Court by Mr. Hogsett, and are in words and figures as follows, to-wit:

RESPONDENTS' EXHIBIT 4

Summary of all cases, and cases from Missouri, in the casebooks used in the first year at the University of Missouri Law School.

COURSES	TOTAL CASES	MISSOURI CASES
Contracts	433	2
Torts	485	3
Equity I	347	2
Real Property I	293	5
Personal Property	202	3
Pleading and Practice	223	5
Criminal Law	300	11
	<hr/> 2283	<hr/> 31

13% of all cases
are from Missouri.

RESPONDENTS' EXHIBIT 5

Summary of all cases, and cases from Missouri, in the casebooks used in the Second year at the University of Missouri Law School.

COURSES	TOTAL CASES	MISSOURI CASES
Equity II	327	2
Equity III	251	3
Evidence	330	5
Sales	416	3
Insurance	218	1

Property II	215	0
Bills and Notes	239	3
Code Pleading	330	18
Wills	184	3
	<hr/>	<hr/>
	2510	38

1.5% of all cases
are from Missouri.

RESPONDENTS' EXHIBIT 6

Summary of all cases, and cases from Missouri, in the casebooks used in the third year at the University of Missouri Law School.

COURSES	TOTAL CASES	MISSOURI CASES
Business Organization	300	4
Trial Practice	372	13
Trusts	298	0
Conflicts	322	7
Administrative Law	92	0
Taxation	155	1
Constitutional Law	290	0
Federal Procedure	143	0
Creditors Rights	211	3
	<hr/>	<hr/>
	2173	28

1.2% of all cases
are from Missouri.

TOTAL OF THREE YEARS

YEAR	TOTAL CASES	MISSOURI CASES
1st year	2283	31
2nd year	2510	38
3rd year	2173	28
	—	—
	6966	97

1.2% of all cases
are from Missouri.

Mr. Hogsett: Q. Now explain the case book system, for the record. A. The case book system is a study of the cases which are brought together in a volume for each course. For example, in the course, we will say in "Contracts" there is a case book on contracts and in that book are brought together cases from various jurisdictions and the instructor and the student work through that book and study and discuss those cases. The student abstracts the case, is called upon to state the case to the instructor, and recite, and there is a recitation between him and the instructor on that case.

Q. Is that same system employed in these other four adjacent Law Schools? A. It is.

Q. Do you know the standing of the Law Schools of Kansas, Nebraska, Iowa and Illinois Universities? A. I do.

Q. What is it? A. Very good.

Q. Are they all members of the Association of American Law Schools and on the approved list of the American Bar Association? A. They are.

Q. Is it a matter of frequent or infrequent occurrence for students to transfer during their Law course between Missouri Law School and other law schools, including Kansas, Nebraska, Iowa and Illinois? A. That frequently happens.

Q. In those cases, does the student lose any time or does he receive full credit for the work done and move along without losing stride? A. He receives full credit for the work done. He moves right along without any *hiatus*.

Re-direct Examination of W. E. Masterson

Mr. Houston: In dealing with a case book, it is true that you can't tell anything about specialties in Law, by looking at a book as to how much state tone the school carries.

A. I don't know what you mean.

Q. From your experience at Harvard, and from your experience in teaching, you know that the fact two men use the same book,—in different jurisdictions does not answer the question of whether either of them specializes, or does not, in state law? A. It does if he uses the case book.

Q. It does not answer the question as to whether in the instruction of the student he correlates the state law? A. It does not.

Q. It does not answer the question of whether the mere naming of the case book,—as to whether the instructor specializes in the state law or not?

Mr. Hogsett: We object to his arguing with the witness.

The Court: Let him answer.

Mr. Houston: Q. Let me straighten the question out. An instructor at the University of Missouri School of Law can take the same case book that would be used at Chicago and still specialize on Missouri law by relating to each case in the case book any Missouri decisions and Missouri statutes?

A. That would not be specializing on Missouri law, but incidentally to bring in a Missouri case in connection with the general principle of the law.

Q. But in using the same case book that is being used at Chicago he could exhaust the Missouri law on that subject? A. Certainly, he could,—he could abandon cases if he wanted to. He is the master of his course.

Q. The mere fact that the same case book is used in Kansas, Illinois, and Iowa, as well as in the University of Missouri, does not answer the question as to whether Missouri U. does or does not specialize in Missouri law? A. Except that I must qualify that by saying that the cases in the book constitute the great body of instruction and discussion from day to day.

Q. That is not so as to each teacher, is it? A. I would be disappointed if I had a member of my faculty with reference to whom it were not so. My point is that it weakens any Law School to specialize in local law.

Q. Do you know there are state law schools and general law schools,—you would not call the Missouri Law School a general law school in the sense that Columbia and Northwestern and Har-

vard are, would you, in view of the great predominance of Missouri students who are going to settle in Missouri? A. We use the same cases for the basis of discussion as in the other schools you mention.

Q. Would you not say that more attention would be paid to Missouri law as far as student instruction is concerned? I am not talking about instructors' research but about instruction. Reviewing your own course at Harvard, in your undergraduate course at Harvard, wouldn't you say that there was more student instruction given to the students of Missouri University in Missouri law than was given to you at Harvard, in Missouri law? A. That is not true in the courses I teach. I can't speak for absolutely every instructor.

Q. Now when you spoke about the annotations for the Restatement of the American Law Institute, and the fact that, as you said, the faculty was making the Missouri annotations,—the students, of course, get the benefit of the faculty research in their instruction, do they not? A. In what way?

Q. Well, in advising them as to what the Missouri law is and relating it to the Restatement. A. That leads back to the question you are asking,—about how much Missouri law we are teaching,—and the Restatement has no relation to that.

Q. They get the benefit of the research on the annotations? A. In what way? I must be specific. How do they get the benefit of it?

Q. By having pointed out to them at any time where the Missouri law, either statutory or decisions, would either vary from the Restatement or support it, or vary from the general weight of authority or from the case in the case book. A. That would not be any more than mentioning some cases in other jurisdictions.

Q. But he would give the student the benefit of his Missouri research? A. But I would have to know how.

Q. Do you mean that the teacher does not give the student the benefit of his research in his teaching? A. Of course he does, but that leads back to the question you asked a while ago,—how much Missouri law does he teach? The fact that he is doing research in annotations does not mean he will do work in Missouri law in his teaching.

Q. Gaines would not have a chance,—assuming he could be a member of the student body of the University of Missouri, in his first year, to work on the Law Review, but he would have an equal chance with anybody else according to his scholarship? A. On the Law Review?

Q. Yes. A. Yes.

Mr. Houston: That is all.

Recross Examination of W. E. Masterson

Mr. Hogsett: Q. Just one more question, on this: Some of the best lawyers we have in this state are graduates of schools out of the state is that not true? A. Oh, yes.

Q. In your opinion as an educator, can a student, desiring to practice law in Missouri, as

many lawyers from out of the state do, get as sound, comprehensive, valuable legal education in the law schools of the universities of Kansas, Nebraska, Iowa, and Illinois, as in the University of Missouri. A. Yes, I would think so.

Q. So far as the value to the student is concerned, the Law School does not have to be a member of the Association of the American Law Schools, or on the approved list of the American Bar Association, does it, so far as value to the student is concerned? A. That is true.

Q. The thing that is important to the law student is that he be qualified to pass the bar examination, or to take it? A. Proper instruction in the law, plus the equipment for the bar examination; yes, sir.

Re-direct Examination of W. E. Masterson

Mr. Houston: Q. As a matter of fact, the Association of American Law Schools discountenances the prepping of law students for the bar examination, is that not true? That is not the purpose of Law School? A. As a policy, we do not aim to prepare for a bar examination,—that is right. I should say the general aim is to lay a thorough basis for the practice of law.

Q. By taking this as a theoretical question only,—although there is that similarity between the systems of Law of every American jurisdiction whereby a student can go to a first rate law school in one state, and, with extra preparation as to the state where he wants to practice, prepare himself to practice in that state,—nevertheless, he

would have an advantage if in the three years' course of study in that law school he was being made familiar constantly or continually with the peculiarities of the law of the state in which he wants to practice? A. I don't know that that would be the case at all. If he was being constantly familiarized with the local law of the state, the major purpose of instruction in the law school would be very restricted and he would lose in that respect.

Q. Have you ever practiced law, sir? A. Yes.

Q. In Missouri? A. No, not in Missouri.
(Witness excused.)

The Court: Well, Gentlemen, it is 10 minutes to 12, and if we put another witness on the stand we would have to adjourn in the middle. We will take a recess to 1:15.

.

NOTE: And now a recess was taken for the noon hour. Court reconvened at 1:15 P. M. of the same day, all present as before, at which time the following proceedings were had herein, to-wit:

The relator called as a witness S. WOODSON CANADA, who, being duly produced, sworn and examined, testified as follows, to-wit:

Direct Examination of S. Woodson Canada

Mr. Houston: Q. Mr. Canada, state your full name, please. A. Silas Woodson Canada.

Q. You are the Registrar of the University of Missouri? A. Yes, sir.

Q. How long have you been in that position?
A. About 13 years.

Q. Is the University School of Law the only publicly supported law school in the state of Missouri? A. I believe it is, sir.

Q. In the admission of students you make no geographical distinction as to where the student comes from, is that correct? A. That is correct.

Q. You admit white students from other states? A. Yes, sir.

Q. Do you admit foreign students? A. Yes, sir.

Q. Do you allow the admission of such students to the entire University? A. Yes, sir.

Q. Do you admit Chinese students? A. To the University, yes, sir.

Q. Japanese students? A. Yes, sir.

Q. Hindu students? A. Yes, sir.

Q. The only students you bar would be students of African descent, is that right? A. Other things being equal, I think so, yes, sir.

Q. That is regardless of whether they are native or non-natives of Missouri? A. Yes, sir.

Q. Now these foreign students,—you don't raise any question about whether they are going to locate in Missouri after they receive the benefit of instruction in the University of Missouri, or immediately going back home? A. No, sir.

Q. Does the tuition of the foreign students pay the whole cost of instruction? A. I don't know.

Q. Do you understand what I mean by the

question? A. I think I understand the question.

Q. But the answer is that you don't know.

A. I don't know.

Cross Examination of S. Woodson Canada

Mr. Hogsett: Q. And the reason, Mr. Canada, that persons of African descent are not admitted into Missouri University is because, you understand, the state of Missouri has provided other facilities for their education? A. Yes, sir.

(Witness excused.)

And the relator called as a witness T. D. STANFORD, who, being duly produced, sworn and examined, testified as follows, to-wit:

Direct Examination of T. D. Stanford

Mr. Houston: Q. Your full name? A. Tony David Stanford.

Q. You are Assistant Secretary of the University of Missouri? A. Yes, sir.

Q. As such, do you have dealings with the fiscal management of the University? A. Yes, sir.

Q. Do you know anything about the per capita cost of instruction in the different schools? A. I do not.

Q. That does not come under your jurisdiction? A. No, sir.

Q. You have presented here certain facts for the budget of the School of Law,—do these fig-

ures represent the budget or actual expenditures?

A. For the year 1935, it represents actual expenditures.

Q. Can you break that down so as to show the amount of money received from the State and amounts received by tuition? A. I cannot at this time.

Q. Can you do that? A. Yes, it might be broken down.

Q. Will you also indicate the excess that the State has to put up, over the tuition paid by the student? A. I would not be able to do that.

Q. Would you be able to get those figures from the files? A. I can only show what part of this expense was paid either from the general funds of the University or paid from state appropriations.

Q. And what part was paid by tuition? A. Well, "general funds" paid by the University come from tuition funds paid and other sources.

Q. Would you be able to show that as far as the other schools are concerned? A. You mean, the amounts expended either from the state or general University funds?

Q. The proportion. A. I presume it could be done.

Mr. Houston: May it be understood that he can do that later and file it as a memorandum?

The Witness: I am sorry, but I am unable to give an approximate figure as to the tuition paid and state appropriation for any school, from the general fund.

Mr. Murray: Q. Could you do that for the entire University? A. No.

Mr. Houston: Q. Could you prepare that in the afternoon? A. I am afraid not.

Q. Is there anyone else on whom it would not be very much of a burden— A. It would necessitate anyone spending considerable time to give it such a breakdown.

Q. Even an approximation?

Mr. Hogsett: If he is going to do it, it should be done exactly.

Mr. Houston: Can it be filed later subject to any objection?

Mr. Hogsett: Would this serve counsel's purpose,—let the witness take his leisure and supplement the memorandum or tabulation he has prepared, with the information that counsel now seeks; let it be considered as presented now even though it is done a week from now,—let it be offered in evidence now?

Mr. Houston: That is perfectly satisfactory. I want to show that the State of Missouri has to contribute to the expense of the instruction of foreign students,—that the amount of money that foreign students pay does not cover the full cost of their instruction.

Mr. Hogsett: Of course we say that is wholly irrelevant, but, nevertheless let him prove that.

Mr. Houston: Thank you.

(Witness excused.)

Mr. Houston: I suggest we give Mr. Stanford's memorandum an exhibit number.

Mr. Hogsett: Let the Reporter have it, and designate it later.

Reporter's Note: Said document later furnished by the witness Stanford to the Reporter is marked Relator's Exhibit T, and is in words and figures as follows:

RELATOR'S EXHIBIT T

UNIVERSITY OF MISSOURI SCHOOL OF LAW

BUDGET July 10, 1936

TOTAL EXPENDED 1935 AND TOTAL

ALLOTTED 1936

	Expended 1935	Allotted 1936	Total
Law Salaries	\$34,033.36	\$34,646.67	\$68,680.03
Law Expense and Equip.	600.78	600.00	1,200.78
Mo. Law Review	.....	500.00	500.00
Law Library Salaries	2,216.64	2,400.00	4,616.64
Law Library Exp. & Equip.	2,642.50	2,757.50	5,400.00
Total	\$39,493.28	\$40,904.17	\$80,397.45

EXPENDED FROM STATE APPROPRIATIONS 1935 AND TO JULY, 1936

	Total Expended 1935	Expended to July, 1936	Total
Law Salaries	\$24,569.68	\$18,927.36	\$43,497.04
Law Expense			

and Equip.	435.49	154.57	590.06
Mo. Law Review	.....	.....	.....
Law Library			
Salaries	1,616.64	1,200.00	2,816.64
Law Library			
Exp. & Equip.	191.29	1,055.13	1,246.42
Total	\$26,813.10	\$21,337.06	\$48,150.16

EXPENDED FROM OTHER UNIVERSITY FUNDS 1935 AND TO JULY, 1936

	Total Expended 1935	Expended to July, 1936	Total
Law Salaries	\$ 9,463.68	.....	\$ 9,463.68
Law Expense			
and Equip.	165.29	64.80	230.09
Mo. Law Review	.....	500.00	500.00
Law Library			
Salaries	600.00	.....	600.00
Law Library			
Exp. & Equip.	2,451.21	522.27	2,973.48
Total	\$12,680.18	\$11,087.07	\$13,767.25

And the relator called as a witness ROBERT L. WITHERSPOON, who, being duly produced, sworn and examined, testified as follows, to-wit:

Direct Examination of Robert L. Witherspoon

Mr. Houston: Q. State your full name. A. Robert L. Witherspoon.

Q. Your business? A. Attorney at Law.

Q. Location? A. In St. Louis, Missouri.

Q. How long have you been practicing? A. About 6 years.

Q. Where did you graduate? A. Howard University, in Washington, D. C.

Q. Do you hold any position in any association of lawyers? A. I do.

Q. And that is what? A. President of the Mound City Bar Association.

Q. What is the Mound City Bar Association?

A. That is an association composed of Negro lawyers of the City of St. Louis and vicinity.

Q. From your work as President of the Mound City Bar Association and your general association in Missouri, can you state approximately how many Negro lawyers there are in the state of Missouri? A. There are approximately 45.

Q. Distributed how? A. We have about 30 in St. Louis, 1 in Jefferson City, and the others are in Kansas City, Missouri.

Q. Are they recent accessions to the bar, or are most of them old practitioners? A. Most of them are all old practitioners.

Q. How many Negro lawyers have come into the bar of Missouri within your knowledge, say within the past five years? A. About 3.

Q. Going back to your law school,—was there any particular concentration in the distribution of students at Howard University,—did those students come mostly from one jurisdiction or several? A. From several jurisdictions.

Q. Was there any particular attention paid to the law of a special jurisdiction in your instruction there? A. No.

Q. When you decided to come out to the state of Missouri to practice, were you able to—were you prepared for the bar examination and practice first on the basis of the instruction received?

Mr. Hogsett: We object to that as wholly irrelevant. It has not a thing in the world to do with this case.

Mr. Houston: It was opened up by your own cross examination of Dean Masterson.

The Court: I think it is irrelevant, but I will let him answer.

(Question read, by request of witness.)

The Witness: A. I would say, no.

Mr. Houston: Q. What did you have to do?
A. I had to do some special study on the Missouri law and Missouri procedure, and see how the Missouri law worked out with the general law that I had been taught in school.

Q. If you had gone to a school where you were being brought into contact with Missouri law during that three years that you were a law student, would that have been an advantage or not?

Mr. Cave: Just a moment, please,—

The Court: Yes, I think I will have to sustain an objection to that. Objection sustained.

To which ruling of the Court the relator, by his counsel, then and there at the time duly excepted and saved his exceptions.

Mr. Houston: Q. In coming to the bar of the State of Missouri, did you find any handicap in comparison with the lawyers who had been

trained locally,—say at the University of Missouri?

Mr. Hogsett: We object to that as wholly irrelevant.

The Court: I will let him answer.

The Witness: A. Yes, I did.

Mr. Houston: Your witness.

Mr. Hogsett: No questions.

(Witness excused.)

And the relator called as a witness J. D. ELLIFF, who, being duly produced, sworn and examined, testified as follows:

Direct Examination of J. D. Elliff

Mr. Houston: Q. Your full name, please?

A. Joseph Dollivar Elliff.

Q. Your address? A. 705 Maryland Place, Columbia.

Q. Dr. Elliff, you are a member of the Board of Curators of Lincoln University, are you not? A. Yes, sir.

Q. And President of the Board? A. Yes, sir.

Q. Are you acquainted with the fact that plaintiff here, Lloyd L. Gaines, has made application for admission to the School of Law of the University of Missouri? A. Yes, sir.

Q. When was this matter first brought to your attention? A. I saw it in the public press,—I can't tell you the date.

Q. Did there come a time when you had a conference with any of the officials of the University of Missouri on the case? A. No, not.

specifically on that case.

Q. May I show you this telegram? (Showing witness telegram, Relator's Exhibit I). A. (Witness looking at same) What do you want me to say about this?

Q. The only thing I am asking about that is,—did you at the date of that telegram, which I think is September 18th,—had the case been brought to your attention at that time? A. I don't know. I think not, but I am not sure.

Q. In the fall of 1935, did you have occasion as a member of the Board of Curators of Lincoln University to consider this case and the general matter of the possibility of a legal education of Negroes in the state of Missouri? A. No.

Q. How long have you been a member of the Board of Curators of Lincoln University? A. Almost 6 years, I think,—more than five.

Q. In those six years, has Lincoln University offered anything more than undergraduate collegiate instruction? A. No.

Q. Doctor, at the time you went to the Board of Curators of Lincoln University, was Lincoln University at that time an accredited institution? A. No.

Q. It has since become accredited? A. It has.

Q. Were you on the Board at the time the Hackmann case was decided? A. Which case?

Q. Lincoln University against Hackmann, where the Lincoln University brought a mandamus against the State Auditor to get him to honor a requisition for the fees of an architect where the Board of Curators of Lincoln University had attempted to develop an expansion program in

1921,—are you familiar with that case? A. No.

Q. As a member of the Board of Curators of Lincoln University, have you had up for consideration the question of the expansion of Lincoln University? A. Yes, sir.

Q. In considering the expansion of Lincoln University, you have considered the question of public need, have you not? A. In some measure. We consider that definitely now.

Q. As the public need appears to shape up, have you any program projected for the expansion of Lincoln University? A. No definite program,—I would like to qualify that. At the present time we are making a very careful survey of Negro education in Missouri to determine what Lincoln University should do for its people, that it is not now doing; and on the basis of that we shall formulate a definite program of expansion.

Q. At the present time there is no such program? A. No.

Q. At the present time, have you any money available for a program of expansion?

Mr. Cave: If the Court please, we object to that as calling for a conclusion. I think the Chairman of the Board should be required to give the money on hand at this particular time, which money is appropriated by the legislature for certain purposes, untagged, which they may use for various purposes.

The Court: That is a direct question, I will let him answer.

*The Witness: Will you ask that question again?

(Question read by the Reporter upon request.)

The Witness: A. I can't answer that, in a way, but the real answer is that our present appropriations of funds are all hypothecated to run the institution as it now stands for the remainder of the biennium.

Mr. Houston: Q. Is the present plant of Lincoln University sufficient to take care of the demands made upon it by its Negro constituency for undergraduate training alone? A. Except in one particular. We will evidently have to turn away women this year for lack of accommodations and homes for them. We have not had to do it yet, but we certainly will have to do it this fall.

Q. Have you any money available to provide the additional dormitory equipment necessary to take care of these extra women? A. Not now.

Q. Do you have teachers there with academic titles such as "Professor," "Associate Professor," "Assistant Professor," the same as they have at the University of Missouri? A. Yes, sir.

Q. Can you state whether the Professors at Lincoln University get the salaries that the Professors get at the University of Missouri, in the same departments,—for the same grade?

Mr. Hogsett: We object to that as wholly immaterial.

The Court: Objection sustained.

To which ruling of the Court the relator, by his counsel, then and there at the time duly excepted and saved his exceptions.

Mr. Houston: If permitted to make proof,

we would show that the salaries paid at Lincoln University are much less than the salaries paid in the same department, for similar grade, at the University of Missouri.

Mr. Hogsett: To which the respondents object for the same reasons asserted when the objection was sustained by the Court.

The Court: Objection sustained.

To which ruling of the court the relator, by his counsel, then and there at the time duly excepted and saved his exceptions.

Mr. Houston: Q. Dr. Elliff, so far as your information is concerned, is any money available at the present time with which Lincoln University could inaugurate a law school?

Mr. Hogsett: We object to that for the same reason. The appropriation Acts of which the Court takes judicial notice will show the amount appropriated, and we will, as a part of our case, show the unexpended balances in each fund as of August 9, 1935, at the time the relator graduated; as of September 6, 1935, the date he applied for admission to Missouri University; and as of April 17, 1936, the date he brought this suit,—and when that proof is in the record the figures will speak for themselves.

The Court: Well, I will let him answer. Objection overruled.

(Question read by request of witness.)

The Witness: A. Do you mean by "the present time" today?

Mr. Houston: Q. Let us make it August, 1935. Let me rephrase the whole question: In

August, 1935, was there money available with which Lincoln University could inaugurate a law school without crippling the existing plant and situation of Lincoln University?

Mr. Hogsett: We object to that as calling for the conclusion of the witness.

The Court: Objection sustained.

To which ruling of the Court the relator, by his counsel, then and there at the time duly excepted and saved his exceptions.

Mr. Houston: Q. In August, 1935, was there any money available for the Board of Curators of Lincoln University which was not allocated for the continuation of Lincoln University as it then stood and was operating, or else allocated to other specific purposes?

Mr. Hogsett: We object to that question for the reason that it is speculative and asks for the conclusion of the witness. Let us see where that leads. For the purpose of supporting this objection I will say to Your Honor that we will show by the records that Lincoln University was allotted several hundred thousand dollars at the session of 1935; that at the very time counsel speaks of, August 9, 1935, there was unexpended from those appropriations these funds: Salaries, \$138,684; Repairs, \$15,943; operation,—a very elastic term,—\$56,433; United States Government Fund, \$3,223; total \$214,213. Now he asks the witness, in the face of the fact that the figures will really tell, to make a rank speculation and conclusion. If what he wants is to show how much money they had, the figures will tell. That

is one objection. The second is this:—the question is in its nature hypothetical. "Would there have been enough money to establish a law school?" The undisputed proof is that nobody has ever asked Lincoln University to establish a law school, and this question is objectionable on that ground, also.

Mr. Houston: Of course the law does not require you to do a vain thing.

Mr. Hegsett: How did Gaines know it was "a vain thing?"

The Court: I am going to let him answer it.
(Question read.)

Mr. Houston: Q. Was there any money available for Lincoln University, as the school was then operated, that was not allocated for specific purposes?

Mr. Cave: Same objection.

The Court: Overruled.

Mr. Cave: The appropriation will speak for itself. I don't know whether he means allocation by the Board of Curators. The appropriation bill would be the best evidence of that. Dr. Elliff can't give his opinion on whether it was or not,—or whether he is referring to the way it was allocated in the appropriation bill—

The Court: I am going to let him answer.

The Witness: A. Frankly, I do not know. I can't answer that question. Perhaps a careful inspection of the records of the Board at that time would enable me to form an answer but I can't answer it specifically.

Mr. Houston: Q. The money available to Lin-

coln University in 1935 was to last how long? A. Two years time, until the next General Assembly.

Q. Can you give any approximation of how much it costs to run Lincoln University for 1935 and '36? A. That is all a matter of record.

Q. Is that record here? A. No. It can be found in the record of the Board's proceedings. I can't remember dollars and cents when it runs up that high. We plan to use the appropriation.

Q. But did you not say at the outset of your testimony that there is no money available for expansion? A. Immediate expansion,—now?

Q. Yes. A. I think that is true.

Q. Does Lincoln University usually wind up with a deficit every two years? A. No, we will have a little deficit, but a very small one, on our Building Fund.

Q. On the matter of state scholarships to Negro students,—has the Board of Curators of Lincoln University handled the state scholarships up to the present time. A. No. That has been handled by a member of the Board and the State Superintendent of Public Schools.

Q. Did the Board authorize him to do that? A. No.

Q. At the present time the only way for Lincoln University to get money,—except for philanthropic grants, which are uncertain;—would be through student tuition and other income such as appropriations from the legislature? A. Not quite. We had \$50,000 from one of the Foundations and occasionally we get something,—\$5,000

from another, and gifts from Foundations and persons.

Q. Are they usually given for specific purposes? A. They are.

Q. Has any Foundation given you a gift for a law school? A. No.

Q. Has there been any appropriation made by the State of Missouri for a law school at the Lincoln University? A. Not as far as I know.

Mr. Hogsett: You mean, specifically for a law school?

Mr. Houston: Yes.

Cross Examination of J. D. Elliff

Mr. Hogsett: You speak of a small deficit in one fund,—the Building Fund. That is about \$3,000, isn't it,—which is trifling, comparatively speaking?

A. I might explain it.

Q. Go ahead. A. It is on our buildings. The General Assembly gave us money for two buildings and we contracted them within the appropriation, but because of increased costs and labor trouble, we had to increase the expenditures and we are running a little short.

Q. But you are running short only in that one fund? A. Yes, sir.

Q. And only to that extent? A. That is all.

Q. Now, Mr. Houston has asked you a good many questions about a law school in Lincoln University. You never have been asked by any Negro for a legal education in Lincoln University,

have you, or otherwise? A. Not to my knowledge.

Q. This relator has never asked Lincoln University,—its officers or Curators, or any representative,—for any such education? A. Not to my knowledge.

Q. Well, you would know it if he had? A. I think so.

Q. The state has always, since the institution and establishment of Lincoln University, given you substantially what you wanted, hasn't it? A. Since I have been connected with it.

Q. And that is, for six years? A. About 6 years,—five years to be more exact.

Q. During the time that you have been head of that institution, as President of its Board, the State has given your institution substantially every dollar you have asked,—is that right? A. That is approximately correct, except for one building. They have given us all we asked for, for maintenance.

Q. For maintenance and general funds, they have given you substantially everything you have asked? A. Yes, sir.

Q. You make up your budget, estimating what you will need for the biennial period and apportion it between maintenance, salaries, repairs, building funds, operations, and so forth, and in all instances except one in relation to a building, since you have been at the head of the institution, the legislature has given you substantially all that you have asked,—is that right? A. That is correct.

Q. Now under your administration the institution has grown, too, hasn't it? A. Yes, sir.

Q. Tell approximately what the value of the land, buildings and equipment of that institution was when you took hold of it.—and its value now.

A. I have the data in a folder back at my seat.

Q. Well, you gave this to me yesterday,—see if you verify it.

The Court: Unless there is objection.

Mr. Houston: That is all right.

Mr. Hogsett: Q. You told me yesterday that the value of the lands, buildings and equipment in 1930 was \$362,600; and that it has grown under your administration so that in 1936 it is \$868,854. Is that right? A. I think that is correct.

Q. Doctor, do you know of any other state in the Union that has established a separate university for the education of Negroes? A. No.

Q. So far as you know as an educator, is Missouri a pioneer in that field? A. In the sense of establishing a state university on the same legal basis as the white university in the state, the answer is "Yes."

Re-direct Examination of J. D. Elliff

Mr. Houston: Q. The "University" has not actually come into existence yet?

Mr. Hogsett: We object to that as calling for a conclusion.

Mr. Houston: Oh, no.

The Court: Let him answer. Go ahead and answer, Doctor.

The Witness: A. That involves a definition

of what a "university" is. I think that is perfectly safe. If I may, I want to state my position so the Court will see clearly. When I came on that Board the school was not accredited. We realized that obstruction to our work. Every member of the Board realized it and the first objective was to build up a four year standard college of Arts and Science. A university can be built around Arts and Science, and I think there is but one exception in the whole United States. That required considerable time and effort. That we have accomplished, and Lincoln University today has the basic foundation of a "university" in that respect. We have a faculty, equipment and buildings that rank A-1 as a College of Arts and Science, and the institution is now in a position to expand. We have students and all conditions are favorable, except the financial one. Lincoln is ready to go. As to the number of colleges it is not a—it is a university in the making. It is an embryo university.

Mr. Houston: Q. Financially,—you are not in a financial position now to expand, are you?

Mr. Hogsett: We object to repetition.

The Court: Yes, I think you have gone over that.

To which ruling of the Court the relator, by his counsel, then and there at the time duly excepted and saved his exceptions.

Mr. Houston: Q. In considering the matter of expansion, have you any occasion to investigate the number of Negroes studying law in other state universities? A. We are doing that now

in a survey. We have no definite conclusion to report.

Q. How many are studying law? A. I do not know. I know the number studying in other states.

Q. That is what I mean. A. At the present time, there are no Negro students studying in the states of Illinois, Iowa or Nebraska. There is one at Kansas, at the present moment.

Mr. Hogsett: Q. You mean, non residents? A. I mean residents or any—the one in Kansas is a Missourian.

Mr. Honston: Q. In your plan for expansion, you would have to consider public need? A. Yes, sir.

Q. Would there be more demand for a graduate school of Arts and Science, as you have been able to determine from your knowledge of Missouri and other states, than a law school? A. I do not know. What views our Board would take on an expansion have not been definitely determined. But we are in a position to expand now; but what form it will take, I don't know. That depends on the result of our survey and the money we get from the state.

Q. If you were advised that there were only 30 Negro lawyers in the state of Missouri, and in the last five years only three Negroes have gone into the bar and that there are no Negroes at present registered in the law schools of Nebraska, Illinois and Iowa and just one in Kansas,—would that be sufficient evidence of continuity of demand to warrant asking the legislature for an appropriation for a law school?

Mr. Hogsett: We object to that as the wildest kind of speculation.

The Court: Objection sustained. I think we have gone pretty far afield now.

To which ruling of the Court the relator, by his counsel, then and there at the time duly excepted and saved his exceptions.

(Witness excused.)

Mr. Houston: That is the plaintiff's case.

And now E. F. Elliott was called as a witness by respondents, and was duly produced and sworn.

Mr. Houston: In saying that we rested, Your Honor will recall that before recess we were to go ahead and make the analysis of the Law Reviews,—I think that was to be put in later. They were not brought until the Court was ready to resume.

Mr. Hogsett: You want an agreement that that be done? We agree.

REPORTER'S NOTE: At a subsequent date, to-wit, August 7th, 1936, counsel for relator, Mr. Houston, furnished to the reporter for inclusion in the Bill of Exceptions herein the following document,—which is made a part of the record herein,—to-wit:

LIST OF ARTICLES AND COMMENTS ON MISSOURI LAW IN THE MISSOURI LAW REVIEW

(Caption omitted)

This list is prepared according to agreement of counsel at the trial July 10 and order of court,

subject to examination and correction by counsel for respondents. It is submitted in substantiation of the contention of relator that special emphasis is placed on Missouri law and procedure at the School of Law of the University of Missouri.

Vol. 1, issue No. 1, January, 1936:

Leading articles three, including "The Liability of a possessor of land in Missouri to persons injured while on the land. Page 45.

Comments three, including comment on Williams v. St. Louis. Public Service Company, 73 S. W. (2d) 199 (Mo. 1934) p. 73 recent cases fourteen, including:

(1) Miller v. Richardson, 85 S. W. (2d) 41 (Mo. 1935) p. 78.

(2) Roehl v. Ralph, 84 S. W. (2d), 405 (Mo. 1935), p. 80.

(3) State v. Logan, Callaway County Circ. Ct. (Mo. 1935), p. 82.

(4) Wayland v. Pendleton, 85 S. W. (2d), 482 (Mo. 1935), p. 84.

(5) State v. Wright, 85 S. W. (2d), 7 (Mo. 1935), p. 87.

(6) Manville v. Manville, 81 S. W. (2d), 382 (Mo. 1935), p. 88.

(7) Pulitzer v. Chapman, 85 S. W. (2d), 400 (Mo. 1935), p. 89.

(8) McClellan v. Owens, 74 S. W. (2d), 570 (Mo. 1934), p. 90.

(9) Chambers v. Chambers, 74 S. W. (2d), 104 (Mo. 1934), p. 91.

(10) Corbett v. Milk Wagon Drivers Union, 84 S. W. (2d), 377 (Mo. App. 1935), p. 99.

(11) *Cooley v. Jasper County*, 85 S. W. (2d), 57 (1935) p. 101.

(12) *Mayfield v. Kansas City Southern Ry. Co.*, 85 S. W. (2d), 116 (Mo. 1935), p. 103.

Vol. 1, issue No. 2, April, 1936:

Leading articles, including "Rights of a Corporation in Missouri against promoters for Secret Profits" p. 161 comments two, including comment on Motion for New Trial in Criminal Procedure in Missouri, p. 175 on *State v. Williams*, 87 S. W. (2d) 175 (Mo. 1935) p. 181, recent cases twelve, including:

(1) *First Natl. Bank v. Produce Exchange Bank*, 89 S. W. (2d), 33 (Mo. 1935) p. 186.

(2) *Taggart v. School Dist. No. 52, Carroll County*, 88 S. W. (2d), 447 (Mo. App. 1935), p. 189.

(3) *State v. Pierson*, 85 S. W. (2d), 48 (Mo. 1935), p. 191.

(4) *In re Grenning's Estate*, 89 S. W. (2d), 123 (Mo. App. 1936), p. 192.

(5) *State ex rel v. Taxpayers League, etc.*, 87 S. W. (2d), 207 (Mo. App. 1935), p. 194.

(6) *McCombs v. Fidelity & Casualty Co.*, of New York, 89 S. W. (2d), 114 (Mo. App. 1935), p. 198.

(7) *Kelly v. The City of Cape Girardeau*, 89 S. W. (2d), 41 (Mo. App. 1935), p. 199.

(8) *Selle v. Selle*, 88 S. W. (2d), 877 (Mo. 1935), p. 202.

(9) *Arnold v. May Dept. Stores Co.*, 85 S. W. (2d), 748 (Mo. 1935), p. 208.

**Brown v. Terminal R. R., etc., 85 S. W. (2d),
226 (Mo. App. 1935), p. 208.**

Approved:

S. R. REDMOND,

W. S. HOGSETT.

And here the relator closed his case in chief.

RESPONDENTS' EVIDENCE

The respondents, to maintain the issues upon their part to be maintained, offered and introduced evidence as follows, to-wit:

E. F. ELLIOTT, having been duly produced and sworn, as aforesaid, was now examined and testified as follows:

Direct Examination of E. F. Elliott

Mr. Hogsett: Q. Your name, please? A. E. F. Elliott.

Q. Your residence? A. Jefferson City, Missouri.

Q. What official position do you hold? A. Chief Clerk of the Supreme Court of Missouri.

Q. As such, are you the official custodian of the records of the Missouri State Board of Law Examiners? A. I am.

Q. And have you at my request made a tabulation showing the number of applicants for admission to the Bar of Missouri for the five year period, 1931 to 1935, inclusive; and a tabulation of the number of those who had studied law in the

University of Missouri Law School? A. Yes, sir.

Q. Will you state the results of that tabulation? A. The total number, 1931 to 1935, inclusive, 3284 applications filed.

Q. Of those, how many studied law in the University of Missouri Law School? A. 246.

Q. The Supreme Court Library is located in Jefferson City, is it not? A. Yes, sir.

Q. Lincoln University is located in Jefferson City, is it not? A. Yes, sir.

Q. And only a few blocks apart? A. Yes, a few blocks apart.

Q. The Supreme Court Library is open to the public, is it not? A. Yes, sir.

Q. That library is one of the most complete law libraries in the state of Missouri, is it not? A. Yes, sir.

Cross Examination of E. F. Elliott

Mr. Houston: Q. Do you know whether the fact that the library is open to the public would have any bearing upon whether it could be accredited to a law school? A. I would not say.

Q. Of the 246 applications made from the University of Missouri, how many passed? A. I could not say that.

Q. Then you don't know the percentage of those who passed from Missouri University as compared to those who came in or applied from other states? A. At a rough guess, I would say about 90 per cent.

Q. Of the University of Missouri passed?

A. Yes, sir.

Q. What is the usual percentage of passing?

A. Average?

Q. Yes. A. Well, about 85 per cent.

Q. You mean, 85 per cent of those who take the examination pass? A. From law schools.

Q. Well, then, the University of Missouri has a slightly higher average than the other schools? A. I could not say that, but that is a mighty good law school, at Missouri.

Q. Didn't you just say that about 90 per cent passed? A. About 90 per cent, something like that.

Mr. Hogsett: Q. That estimate of 90 per cent and 85 per cent is just an estimate made on the spur of the moment? A. Yes, sir.

Q. As a matter of fact, an examination of the record might show that those percentages were reversed? A. Sure.

Mr. Houston: Q. But at the present time, that is your best information and judgment? A. It was just a guess.

Q. But it was your best guess? A. Yes, sir.

(Witness excused.)

And now the respondents called as a witness I. C. TULL, who, being duly produced, sworn and examined, testified as follows:

Direct Examination of I. C. Tull

Mr. Hogsett: Q. Please state your name to

the Court. A. I. C. Tull.

Q. What is your occupation? A. Business Manager of Lincoln University.

Q. How long have you held that position? A. 17 years.

Q. Have you at our request made a tabulation of the unexpended balances as of August 9th and September 6th, 1935; and as of April 17th, 1936? A. I have. It is in my brief case.

Q. Will you kindly get it? A. (Witness left the stand and returned, with records.)

Q. Before you answer the question,—

Mr. Hogsett: I wish to call the Court's attention to the fact that in the appropriation act of the legislature found at page 66, Laws of Missouri 1935, appear two appropriations to Lincoln University,—one of \$400,000, and another of \$34,200; or \$434,200 total.

Q. Now will you please give us the unexpended balance in each fund out of the appropriation to Lincoln University as of the dates I specify,—first, August 9, 1935. A. Personal service,—which is salaries,—\$138,684.63; repairs and replacements, August, 1935, \$15,943.36; operation \$56,433.75; additions, \$100,000.

September 6, 1935, salaries \$131,247.96; repairs and replacements, \$14,207.58; operation \$53,164.62; additions \$100,000.

April 17, 1936: Personal service, or salaries, \$70,284.65; repairs and replacements, \$5,770.89; operation \$22,376.21; additions \$61,433.98.

These are the state revenue appropriations.

The "addition" is used for construction of buildings, only, and for no other purpose.

Q. That part of these figures you have labeled as "additions" is earmarked to be used for buildings? A. Yes, sir; and only for buildings. That is in addition to PWA funds. This tabulation is complete for state revenue. Now in the federal fund, Morrill-Nelson Fund, we had a balance, August, 1935, of \$3,223.07. September 6, same balance: April 17, 1936, \$1265.73.

Q. That is all. Thank you.

Cross Examination of F. C. Tull

Mr. Redmond: Q. This \$34,200 appropriation of 1935, out of the Lincoln University fund,—wasn't that just permitting the University to use the money that the students had paid the University as tuition and fees? A. Yes, that is the earnings.

Q. That was no money out of the state, but money that the state had collected? A. That is right.

Q. This money was appropriated in 1935 for those two years. Until when is it supposed to run? A. Until December 31, 1936.

Q. Until December 31, 1936. There was a balance of \$159,000, April 17, 1936. Judging from your experience in the past, will there be a balance or a deficit December 31, 1936? A. It will be a deficit. We will have to make up a deficit for the state appropriations through the Lincoln University funds,—I am hoping to do that. That is mere speculation, of course.

Q. This money that you have specified is money for the operation, of the school, without any expansion, other than additions and buildings for college purposes? A. That is right.

Q. Has any money been appropriated for expansion other than building buildings, for college purposes? A. No, sir.

Mr. Hogsett: We object to that as calling for a conclusion. The appropriation Acts speak for themselves. It is obvious that any of the funds included for such purpose would be available for expansion.

Mr. Redmond: I don't think they can wait to find what the answer will be, and then object.

The Court: I will let it stand.

(Witness excused.)

Mr. Hogsett: I want the record to show, Your Honor, that I call your attention to the following: Session Acts 1921, on page 65, the amount appropriated for Lincoln University, \$329,500. At page 87, \$500,000. I think in all fairness it should be stated that that appropriation was declared unconstitutional, and the School never got any benefit of it. I mention it, nevertheless. At page 101, \$595.66, that was, for the year, including the \$500,000, \$830,095.66. Session Acts of 1923, at page 51,—\$11,946.41.

The Court: Don't this show (indicating paper) the exact amount they did get?

Mr. Hogsett: By subtracting the \$500,000 \$330,095.66, which they did get in the '21 Laws. Now coming to 1923, page 51, \$11,946.41.

Mr. Redmond: Would you specify that that was a deficiency bill?

Mr. Hogsett: I don't know about that,—maybe,—it is an odd amount. At page 60, \$49,330.42. Page 60, \$70,000. Page 96, \$174,730. Total for that session, \$306,006.83.

Session Laws of 1925, page 57, \$996; page 78, \$224,700; total for that session, \$225,696.

Session Laws of 1927, page 88, \$278,000.

Session Laws of 1929, page 24, \$306,500, Page 101, \$250,000. Total for that session, \$556,500.

Session Laws of 1931, page 46, \$520,655.

Session Laws of 1933, page 124, \$286,000; page 130, \$40,000; total for 1933 session, \$326,000.

Session Laws of 1935,—that is the last one,—page 66, \$400,000; page 66, \$34,200; total for that session \$434,200.

The total for all these appropriations, \$3,477,153.49,—from which should be subtracted \$500,000 eliminated by the decision in the Hackman case, leaving a net balance of \$2,977,153.49.

Now I call counsel's attention to the fact that at page 47 of the Session Laws of 1931 the record shows \$520,655 to the Lincoln University at Jefferson City as I stated.

Mr. Redmond: But \$208,155 of that was re-appropriated; out of the \$250,000 of two years before.

Mr. Hogsett: I don't know.

Mr. Redmond: I think you will find that is a fact.

Mr. Hogsett: And they got it during that biennium.

Mr. Redmond: But they didn't get it the biennium before. I would like for the record to show that for the biennium of 1931 \$208,155 of the appropriation was the unexpended part of \$250,000 appropriated in 1929 for additional buildings, and was not an additional amount.

The Court: They had appropriated it the session before and the money was not spent and the next time it was reappropriated?

Mr. Redmond: That is it.

Mr. Hogsett: Now by agreement of counsel the distances and railroad fares from St. Louis to Lawrence, Kansas, Lincoln Nebraska, Iowa City, Iowa, and Champaign, Illinois, and the railroad mileage and fares from certain other towns in Missouri to Columbia, Missouri, are as follows: (Producing a sheet of paper.)

Mr. Redmond: We will stipulate that that is in there.

Mr. Hogsett: Counsel for relator stipulated that the facts stated in that letter, Exhibit 7, are correct.

Respondents' Exhibit 7, mentioned above, is in words and figures as follows, to-wit:

RESPONDENTS' EXHIBIT 7

June 15, 1936

In re: State ex rel Gaines v. Curators of the University of Missouri, et al.

Mr. S. R. Redmond,

11 North Jefferson Street,
St. Louis, Missouri.

Dear Sir:

In line with our tentative agreement at St. Louis, we would like for you to admit at the trial that the distances and railroad fares from St. Louis to Lawrence, Lincoln, Iowa City and Champaign, and the distances and railroad fares from certain other towns in Missouri to Columbia, Missouri, are as follows:

	Mileage	Fare
St. Louis to Columbia	146	\$2.95
St. Louis to Champaign	174	3.48
St. Louis to Iowa City	299	5.98
St. Louis to Lawrence	319	6.38
St. Louis to Lincoln	468	9.35
Rockport to Columbia	308	6.04
Caruthersville to Columbia	367	7.41
Kahoka to Columbia	178	3.59

We have investigated these facts and are advised by the Wabash Railway Company agents that they are correct.

Will you also agree that any parts of the respective catalogs of the Universities of Missouri, Kansas, Nebraska, Iowa and Illinois may be received in evidence for the purpose of proving the respective curricula, tuition and other fees, and case books used by the schools of law in those institutions. Of course we can bring witnesses to identify the catalogs, and to testify to their correctness in respect to these matters, but to avoid that unnecessary expense we request that you make this agreement. It is quite possible that you may desire to offer some parts of these cata-

logs, and of course we make the same agreement in your favor.

Kindly let us have a prompt reply to this letter. Thanking you, we remain

Yours very truly,

WSH:K

P. S. If there are any facts you want us to admit, we will do so if possible.

Mr. Hogsett: From the University of Missouri catalogue, 1936-1937, I offer pages 56 to 66, showing the accredited schools in Missouri,—the point being in that, that Lincoln University is not among the accredited schools in the University of Missouri catalogue. From the same catalogue I offer in evidence pages 67 to 71, inclusive, the portion that I have indicated in brackets, showing the tuition and fees. Counsel has heretofore offered pages 224 to 226, inclusive, so I will not offer that. From the same volume I offer pages 323 to 327, inclusive, the portion in brackets, being a detailed description of the curriculum of the Missouri Law School, with a list of the case books. Now I ask the Reporter to identify the volume as an Exhibit.

NOTE: Said volume was marked by the Reporter as Respondent's Exhibit 8, (Same as Relator's Exhibit P.)

The Court: If there is no objection it will be admitted in evidence.

Mr. Hogsett: The Court will understand I am

offering in evidence just the portions of the Exhibit specified.

Said portions of Respondents' Exhibit 8, so offered in evidence as aforesaid, are in words and figures as follows, to-wit:

Pages 56 to 66 of Respondent's Exhibit 8 contain a list of all of the schools, colleges and universities accredited with the University of Missouri. This list includes 21 colleges and universities, 17 junior colleges and approximately 800 secondary schools. Neither Lincoln University nor any other school, college or university for Negroes appears among the accredited schools so tabulated.

The University of Missouri catalogue, Respondents' Exhibit 8, contains a list of all the schools, colleges and universities accredited with the University of Missouri that are located in the State of Missouri. No others are specified.

A note immediately preceding the list of secondary schools reads as follows:

"The University of Missouri will accept the certificate from any school accredited by the North Central Association of Colleges and Secondary Schools or by the Association of Colleges and Secondary Schools of the Southern States. Schools on this list marked with a star (*) are on the North Central Association list."

Pages 67 to 71, inclusive, of said Respondents' Exhibit 8 relate to Tuition and Fees, and specify the following fees to be paid by a Missouri resi-

dent student in the School of Law of the University of Missouri:

Library, hospital and incidental fees, \$4.00 per credit hour (normally 29 hours the first year, and 25 hours the second and third years).

Activity fee, per semester, \$5.75.

Diploma fee to be paid for each degree taken in the University, \$5.00.

Fee for each certificate, \$2.00.

Said pages of Respondents' Exhibit 8 also provide that the University reserves the right at any time to make changes in any or all fees, without advance notice.

The parts of pages 323 to 327, inclusive, of said Respondents' Exhibit 8, so offered in evidence, contain a detailed description of the curriculum of the School of Law of the University of Missouri, and the case books used in the various courses of study therein. Said curriculum is composed of a three-year course in the study of the law. During the first year the subjects taught and the hours of credit allowed are as follows:

Contracts, 6 hours.

Torts, 6 hours.

Personal property, 3 hours.

Pleading, 4 hours.

Real property, 3 hours.

Equity, 3 hours.

Criminal law and procedure, 3 hours.

Legal bibliography, 1 hour.

The required courses for the second year, and

the hours of credit allowed for each are as follows:

Equity, 2 hours.
Pleading, 2 hours.
Evidence, 5 hours.

The elective courses for the second year, and the hours of credit allowed for each are as follows:

Conveyances, 5 hours.
Bill and notes, 3 hours.
Wills and administration, 3 hours.
Sales, 3 hours.
Statutory interpretation, 3 hours.
Insurance, 2 hours.
Quasi contracts, 3 hours.
Persons, 2 hours.
Legal research, 2 hours.

The required course for the third year, and the hours of credit allowed therefor, are as follows:

Practice, 5 hours.

The elective courses for the third year, and the hours of credit allowed for each are as follows:

Trusts, 3 hours.
Business organization, 7 hours.
Constitutional law, 5 hours.
Conflict of laws, 3 hours.
Administrative law, 3 hours.
Legal ethics, 1 hour.
Creditors' rights, 3 hours.
Taxation, 3 hours.

Federal procedure, 2 hours.

Equity, 3 hours.

Future interests, 3 hours.

Mortgages, 3 hours.

Public utilities, 3 hours.

Municipal corporations, 2 hours.

Legal research, 2 hours.

Mr. Hogsett: Now under agreement of counsel, I offer the Bulletin of the Universities of Kansas, Volume 37, No. 1, being a general information catalogue which the Reporter will now mark as Respondents' Exhibit 9 for identification. (Same was marked as directed.) At pages 23 and 24 of that Exhibit I offer the portion indicated in brackets, showing the fees. From the same Exhibit I offer page 114, that portion indicated in brackets, showing the curriculum of the Kansas Law School.

The Court: Let it be considered in evidence.

Said portions of Respondents' Exhibit 9, so offered in evidence as aforesaid, are in words and figures as follows, to-wit:

The portions of pages 23 and 24 of said Respondents' Exhibit 9, so offered in evidence, relate to fees to be paid by students, and specify the following fees to be paid by a student in the School of Law of the University of Kansas:

Matriculation fee: For a resident, \$7.50; for a non-resident, \$15.00. This fee is required to be paid but once, and is never refunded.

Incidental fee, in the School of Law, payable each year, in equal installments by semesters, \$45.00 for a Kansas resident and \$80.00 for a non-resident.

Health fee, \$6.00 per year.

General activity fee, \$6.00 for the fall semester, and \$2.75 for the spring semester.

Diploma fee, \$7.50 for each degree granted.

Page 114 of said Exhibit 9 contains the curriculum of the School of Law of the University of Kansas, and is substantially the same as the curriculum of the School of Law of the University of Missouri.

Mr. Hogsett: Now from another volume, being Bulletin of the University of Kansas, issue No. 2, which the Reporter will mark as Exhibit 10, I offer pages 89 to 93 inclusive, the portion indicated in brackets, being a detailed description of the curriculum of the courses of study and the case books used in the Law School of the University of Kansas. That appears on pages 89 to 93, inclusive, the portion in brackets.

Said Respondents' Exhibit 10, the portions offered in evidence as aforesaid, is in words and figures as follows, to-wit:

The portions of pages 89 to 93, inclusive, of said Respondents' Exhibit 10, so offered in evidence, contain the detailed description of the curriculum of the courses of study and case books used in the School of Law of the University of Kansas, which curriculum is substantially the same

as the curriculum of the School of Law of the University of Missouri, and the case books used are largely the same as the case books used in the latter school.

Mr. Hogsett: Now I produce the University of Nebraska Bulletin for the College of Law and ask the reporter to identify it as an exhibit.

NOTE: Same was marked as Respondents' Exhibit 11.

Mr. Hogsett: From this last mentioned exhibit I offer the portion on pages 7 to 9, indicated in brackets, being a detailed description of registration fees and expenses and other requirements of that sort. From the same exhibit at page 14, I offer the portion appearing in brackets, being a detailed description of the curriculum of the School of Law, together with the case books used in that system.

Said Exhibit 11, the portions offered in evidence as aforesaid, is in words and figures as follows, to-wit:

The parts of pages 7 to 9 of said Respondents' Exhibit 11, so offered in evidence, relate to fees and expenses to be paid by students, and specify the following fees to be paid by students in the School of Law of the University of Nebraska:

Matriculation fee (payable on entering the college), \$5.00.

Registration fee (each semester), \$1.00.

Medical service (each semester), \$1.00.

Student Union Building Fund (each semester),

ter), \$1.00.

Graduation fee, \$5.00.

Tuition fees, \$4.00 per credit hour (except for courses on contracts, criminal law, common law pleading, and torts, for which the fee is \$3.00 per credit hour; and except legal bibliography for which the fee is \$2.00 per credit hour). The graduation requirements cause the tuition fees to be \$104.00 for the first year, and \$96.00 for each of the second and third years.

Non-resident fee, \$25.00 per semester.

At page 14 of said Respondents' Exhibit 11 appears a detailed description of the curriculum of the School of Law of the University of Nebraska, which is substantially the same as the curriculum of the School of Law of the University of Missouri. On said page also appear the case books used in the various courses, which are largely the same as the case books used in the School of Law of the University of Missouri.

Mr. Hogsett: Now under the same agreement that counsel has made with us, I produce the University of Iowa Bulletin which the Reporter will mark as an exhibit.

NOTE: Same was marked as Respondents' Exhibit 12.

Mr. Hogsett: From this exhibit I offer pages 80 to 82, the portion indicated in brackets, showing the expenses and fees, scholarship prizes, and so forth. From the same volume I offer, pages 304 to 307 inclusive, indicated in brackets, and being a detailed description of the curriculum of the

School of Law of that institution and the case books used therein.

Said Exhibit 12, being the portions offered in evidence as aforesaid, is in words and figures as follows, to-wit:

The portions of pages 80 to 82 of said Respondents' Exhibit 12, so offered in evidence, relate to expenses and fees, and specify the following fees to be paid by students in the School of Law of the University of Iowa:

Matriculation fee (paid but once), \$10.00.

Semester fees, payable at the beginning of each semester covering all fixed charges, \$64.00.

Non-resident fee, payable each semester, \$20.00.

Graduation fee, \$15.00.

Certificate fee, \$3.00.

The portions of pages 304 to 307, inclusive, of said Respondents' Exhibit 12, so offered in evidence, contain a detailed description of the curriculum of the School of Law of the University of Iowa, which is substantially the same as the curriculum of the School of Law of the University of Missouri. Said pages also include a list of the case books used in the various courses, which are largely the same as the case books used in the School of Law of the University of Missouri.

Mr. Hogsett: Under the same agreement of counsel, I produce the Bulletin of the University

of Illinois and ask that the Reporter mark it as an Exhibit.

NOTE: Same was marked Respondents' Exhibit 13.

Mr. Hogsett: From page 92 of the last mentioned exhibit I offer the portion in brackets, being a statement of the fees required in that school, and from the same exhibit I offer pages 305 to 307, as indicated in brackets, being a detailed description of the curriculum and case books used in the School of Law of that institution.

The Court: It will be admitted in evidence.

Said Exhibit 13, being the portions offered in evidence as aforesaid, is in words and figures as follows, to-wit:

The portion of page 92 of said Respondents' Exhibit 13, so offered in evidence, relates to the fees to be paid by students, and specifies the following fees to be paid by a student in the School of Law of the University of Illinois:

Matriculation fee, \$10.00.

Incidental fee (payable each semester), \$50.00 for a resident, and \$75.00 for a non-resident of Illinois.

Graduation fee, \$10.00.

The portions of pages 305 to 307 of said Respondents' Exhibit 13, so offered in evidence, contain a detailed description of the curriculum of the School of Law of the University of Illinois, which is substantially the same as the curriculum of the School of Law of the University of Missouri.

Said pages also contain a list of the case books used, which are largely the same as the case books used in the School of Law of the University of Missouri.

And the Respondents called as a witness, E. R. ADAMS, who, being duly produced, sworn and examined, testified as follows:

Direct Examination of E. R. Adams

Mr. Hogsett: Please state your name to the Court. A. E. R. Adams.

Q. What official position do you hold? A. Assistant State Superintendent of Public Schools.

Q. How long have you held that position? A. About 18 months.

Q. When did you begin your term of office in that position? A. January 14, 1935.

Q. As such official have you had charge of the disbursement of the so-called out-of-state tuitions for Negroes, authorized by the 1935 appropriation act? A. I have.

Q. Now the appropriation in 1935 for out-of-state tuitions was \$10,000,—was it not? A. Correct.

Q. Have you, at our request, made a careful examination to ascertain the amount on hand in that out-of-state fund at certain dates,—yes or no? A. I have.

Q. On August 9, 1935,—which, as the Court will recall, was the date Mr. Gaines graduated, what was the unexpended balance in that fund? A. \$2359, I believe.

Q. Well, have you got that accurately? A. I have it.

Q. Will you kindly get it? A. Yes, sir. (The witness left the stand and returned). The exact unexpended balance was \$2359.98.

Q. On September 6, 1935, what was the balance? A. The same amount.

Q. Now on April 17, 1936, what was the balance there? A. I haven't that figure, sir. I have it for a later date.

Q. Just a minute. I think there is a letter here,—I show you a letter from Mr. Lloyd W. King, State Superintendent of Schools, written June 8, of this year,—just the other day,—in which he gives these figures as follows: August 9, 1935, \$6351.18,—remaining as a balance in this fund. On September 6, 1935, \$6351.18 remaining as a balance; and at the present time the unexpended balance is \$2359.98. That does not agree with your figures. I wish you would kindly reconcile them, if you will. Step down from the witness stand, read that letter, then return and tell us what the facts are.

(Witness excused.)

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NOTE: A short recess was taken. Court now reconvened, all present as before, at which time the following proceedings were had herein:

The witness, E. R. Adams, resumed to the stand and the direct examination was continued.

Mr. Hogsett: Q. Mr. Adams, in the recess

period, have you ascertained the correct figures showing the information that I last inquired about?

A. I have.

Q. Will you correct your former answer by giving the correct information? A. I will.

Q. The first date is August 9, 1935. What amount was on hand unexpended in the tuition fund for out-of-state instruction on that date? A. \$6351.18.

Q. Now the same information as of September 6, 1935, please, sir. A. The amount was \$6351.18.

Q. The same as on August 9? A. Yes, sir.

Q. The same amount was in there on each of those dates,—is that right? A. Yes, sir.

Q. Now the same information as of April 17, 1936? A. The balance was \$2214.98.

Mr. Hogsett: That is all.

Cross Examination of E. R. Adams

Mr. Houston: Q. Mr. Adams, this \$10,000 was appropriated for two years, is that right? A. Yes, sir.

Q. Are you the officer engaged in administering it? A. Well, Mr. King is the officer and I am his agent.

Q. Well, you have direct personal knowledge of the administration of that fund? A. I do.

Q. You are administering it under the appropriation act of 1935, is that right? A. Yes, sir.

Q. Under the appropriation act of 1935, you

do not pay the tuition of Negro students outside the state, do you? A. We pay—

Q. You pay the differential? A. We pay the difference.

Q. If the tuition in Missouri is \$50 per year, and the tuition in the other university is \$48, the student gets absolutely nothing,—is that true?

A. That would be the difference, yes, sir.

Q. Well, the answer is "Yes," is it? A. Will you state that question again?

(Question read by the Reporter.)

The Witness: A. Yes.

Mr. Houston: Q. So that, so far as your administration is concerned, the Negro student who, under the interpretation that you place on the act, is compelled to go outside the state, may not get anything whatsoever unless the tuition in the out-of-state university exceeds the tuition at the University of Missouri, and in that event he gets only the balance, or difference.

A. That is correct.

Re-direct Examination of E. R. Adams

Mr. Hogsett: Q. You are not connected with the Board of Curators of the Lincoln University, are you? A. No, sir.

Q. You have nothing to do with enforcing or administering the 1921 statute binding that Board to pay the full tuition, have you? A. No, sir.

Re-cross Examination of E. R. Adams

Mr. Houston: Q. Is there any other scholarship act for Negro students in Missouri be-

side the act you are administering? A. Not that I am familiar with.

Q. Any other scholarship fund, so far as you know? A. Yes, the Rosenwald Fund offers scholarships.

Q. But that is private,—it has nothing to do with this matter? A. We recommend those scholarships through our Department.

Q. That is not a right,—that is a gift of grace, is it not?

Mr. Hogsett: That calls for a conclusion.

The Court: Let him answer.

Mr. Houston: Q. Do you know of any other state fund for Negro scholarships? A. I do not.

Q. By what authority is your office administering this particular fund?

Mr. Hogsett: We object to that for the reason that the appropriation act, itself, would be the basis of any authority.

The Court: Yes, I think the objection will be sustained.

Mr. Houston: I except to that and tender the proof that they are administering this fund absolutely without authority.

Mr. Hogsett: Well, I will withdraw the objection and let him go ahead and prove it.

The Court: Very well, go ahead. Objection withdrawn.

Mr. Houston: Q. By what authority is your office administering this scholarship fund. A. I am not sure that I can answer that. We are administering that because the former administration administered it.

Q. Well let us get that question answered.

A. The administration previous to our coming into office had the duty of administering the fund and we continued to administer it as it had been in former years.

Q. The right of adverse possession? A. Yes, sir.

Re-direct Examination of E. R. Adams

Mr. Hogsett: The 1921 Act, placing the burden on the Lincoln University Curators to pay the full tuition, you have nothing to do with,—you only have to do with administering the funds appropriated by the legislature specifically for excess tuitions,—that is the sum total of the whole thing, isn't it? A. Yes, sir.

Q. That is all. A. We didn't—

Q. That is all. A. We didn't—

Mr. Houston: Let him finish the answer.

The Witness: Up to about September, 1935, our Department was paying the full amount of tuition, and not the difference, but we began to interpret this act and consequently saw that we were not administering it according to the 1931 act, and we ceased to pay anything except the difference.

Mr. Hogsett: That is all.

Re-cross Examination of E. R. Adams

Mr. Houston: Q. Is it not true that demand has now been made upon your office by the Board of Curators to take the administration out of your hands. A. The demand has not been made, so far as I know.

Q. But you know now that there is a dispute,—that the Board of Curators of Lincoln University is contesting your right to administer this fund?

A. Yes, sir. And I hope they take that out of our hands and administer it.

(Witness excused.)

And the Respondents called as a witness, C. B. ROLLINS, who, being duly produced, sworn and testified as follows, to-wit:

Direct Examination of C. B. Rollins

Mr. Cave: Q. Your name is C. B. Rollins?

A. Yes, sir.

Q. You live here in Columbia? A. Yes, sir.

Q. How long have you lived here, Mr. Rollins? A. I have lived here for 82 years.

Q. During that time have you lived in the immediate neighborhood of the Missouri University? A. Almost in the shadow of its dome, sir.

Q. Did your father and family take an active part in the establishment of the University,—in the very beginning of it? A. Yes, sir.

Q. You are familiar with the University and have been during your life time? A. Generally,—quite familiar; yes, sir.

Q. Were you for a number of years a member of the Board of Curators? A. Yes, sir.

Q. And were you for time President of the Alumni Association? A. Yes, sir, I was.

Q. Have you during your entire life time

had direct connection with this University and its growth and development? A. Yes, sir, more or less.

Q. And taken a great interest in its affairs, have you? A. Always.

Q. I will ask you whether, during the entire time that you have known Missouri University, you ever knew of a Negro being admitted to the University, or applying for admission prior to the time of the application that is being heard at this time? A. No, sir.

Q. Has it during that time been the policy of the University, and the policy of the State of Missouri, to provide separate educational systems for the Negroes and for the whites? A. Yes, sir; I think that is a fact.

Cross Examination of C. B. Rollins

Mr. Houston: Q. You were born before the Civil War, is that not correct? A. Yes, sir.

Q. Lots of changes have occurred since then, that is true also? A. Yes, sir.

Q. Missouri has had two changes of constitution since that time,—'65 and '75? A. Yes, sir.

Q. Likewise, the Civil status of Negroes have completely changed, is that not right? A. Yes, sir.

Q. So far as you know, no Negro ever applied to go to the State of Missouri University up to this time? A. I never have heard of such a case.

Q. So far as you know, there has been no occasion on which the University of Missouri has had to make a declaration of policy prior to the

case of Lloyd Gaines, either? A. No, sir.
(Witness excused.)

And the Respondents called as a witness N. T. GENTRY, who, being duly produced, sworn and examined, testified as follows, to-wit:

Direct Examination of N. T. Gentry

Mr. Cave: Your name is Judge N. T. Gentry?

A. Yes, sir.

Q. You live here in Columbia? A. Yes, sir.

Q. And you have lived here all your life, have you, Judge? A. Yes, sir.

Q. What is your age at this time? A. 70.

Q. You are a member of the Boone County Bar and various bar associations, including the American Bar Association? A. Yes, sir.

Q. You have practiced law in Columbia, all your life, all the time— A. All my professional life, yes, sir.

Q. You have served in this state as a member of the Supreme Court of the state? A. Yes, sir.

Q. And as Attorney-General of the state? A. Yes, sir.

Q. And as Circuit Judge of the 34th Judicial Circuit? A. Yes, sir.

Q. During your entire life, have you been familiar with the State University? A. Yes, sir.

Q. You are a graduate of that institution? A. Yes, sir.

Q. You have lived in this community all that time and have been closely connected with the University? A. I have been a neighbor of the University all that time and lived very close to it.

Q. During the time you have been acquainted with the University of Missouri, have you ever known of a Negro being admitted to the University as a student, or making formal application to become a member of the student body of the University? A. No, I never heard of any.

Q. Have you devoted much of your spare time to the study of the history of the state of Missouri and the people of the state of Missouri? A. Yes, sir.

Q. I will ask you whether or not, from your reading and study along that line, it has been the policy of the state of Missouri and of the University to develop in this state an educational system for the whites, and for the Negroes,—separate and distinct? A. Yes, sir.

Q. From the grammar school to the university? A. Yes, sir.

Q. That has been the settled policy of this state since you have known it? A. Yes, sir.

Cross Examination of N. T. Gentry

Mr. Houston: Judge, do you know whether there is any school now in Missouri of higher education where Negroes and whites not only matriculate together but live in the same dormitory? A. In Missouri?

Q. Yes. A. I don't know of any such institution.

Q. Of any institution? A. No, sir; I don't.

Q. Have you ever heard of Eden Theological Seminary in St. Louis? A. Yes, sir.

Q. In Webster Groves,—my mistake. A. I have heard of that school, but I don't know anything about it.

Q. Well, the answer to that question will be—
A. I don't know anything about Eden School.

Q. You have been Judge of the Circuit Court, have you not? A. Yes, sir.

Q. Where is that circuit? A. Here,—Boone and Callaway Counties.

Q. You didn't happen to have any Negro practitioners practicing before you on occasion? A. No, not in the circuit court,—no.

Q. Have any Negro practitioners ever practiced before you? A. Yes, in the Supreme Court.

Q. They sat down at the same bench with white counsel, just as we are sitting now, today?

A. I think the case was submitted on brief. I don't think they made any oral argument.

Q. You do see us sitting here today? A. Yes, sir.

Q. There would be no more friction over white and Negro students sitting down in the same room studying than there is for white and Negro counsel sitting at the same table,—would there?

Mr. Hogsett: That is objected to as argumentative and speculative.

The Court: Objection sustained.

To which ruling of the Court the relator, by

his counsel, then and there at the time duly excepted and saved his exceptions.

(Witness excused.)

And now the respondents called as a witness, F. M. McDAVID, who, being duly produced, sworn and examined, testified as follows:

Direct Examination of F. M. McDavid

Mr. Hogsett: Q. Please state your name to the Court. A. F. M. McDavid.

Q. Where do you live, Senator McDavid? A. Springfield, Missouri.

Q. What official position do you hold with respect to the University of Missouri? A. Member of the Board of Curators, and President at this time.

Q. How long have you been a member of the Board, and how long have you been President of the Board? A. I have been a member of the Board since 1921, in June; President of the Board, I think, since 1931.

Q. Has each member of the Board taken the oath required by law? A. Yes, I think so.

Q. I show you—

Mr. Hogsett: Let it be admitted that the Board of Curators on March 27th, 1936, passed a resolution which has been copied into one of the letters heretofore offered in evidence, to-wit, the letter of March 31st, 1936, marked Relator's Exhibit N, 1-2;—you say "yes" to that?

Mr. Houston: Yes.

Mr. Hogsett: Q. In rejecting Gaines' application, did the Board of Curators act from any other reason than a desire to obey what it conceived to be the mandate of the constitution, the law, and the public policy of the State of Missouri requiring a separation of the races for the purpose of education?

Mr. Houston: We object, because the resolution speaks for itself.

Mr. Hogsett: Our position is this: They say in their petition and in the affirmative writ that the action of the Board was arbitrary, and the motive of the Board is, in that way, put in issue. Of course, the resolution speaks for itself. I have a right to tender affirmative proof to remove from the case any such impression as that the Board was actuated by anything else except what it conceived to be the constitution, the law and the public policy. That is what I am asking this witness.

Mr. Houston: May I suggest that if counsel wants to ask the witness if there were any other motives actuating the Board other than what is expressed in the resolution, that is proper; but I don't think the question is proper in the other form.

Mr. Hogsett: I think that is almost tantamount to what I asked, but I prefer the form in which I put it.

The Court: Let me see the resolution. (Document handed up to the Court) Objection overruled.

To which ruling of the Court, the relator, by

his counsel, then and there at the time duly excepted and saved his exceptions.

Mr. Hogsett: Q. You may answer.

(Question read by reporter, upon request.)

The Witness: A. The Board acted from no other reason.

Mr. Hogsett: Q. Has the Board, as such, ever had any policy on this subject,—has it ever had occasion to formulate any policy until Mr. Gaines attempted to gain admission? A. The matter has never come before us.

Q. So, when, for the first time in the history of the institution, a Negro applied for admission, you acted on what you conceived to be your duty under the law? A. That is correct.

The Court: I am admitting those questions and answers on the theory that it is for the purpose of showing that there is no malice or ill will.

Mr. Houston: As far as there being any personal malice or ill will, we don't argue that. It is a question of the legal effect of the act.

Mr. Hogsett: Q. From your connection with the business or profession of Education,—what would be the effect of the admission of Negroes into the University of Missouri? A. I think it would create a great amount of trouble.

Q. How? A. I think that it would make discipline difficult. For this reason;—everybody knows, every citizen knows; what the constitution of Missouri provides with respect to separate education of the two races. Every citizen and every student is perfectly familiar with the general policies of the State of Missouri that

have been recognized through the years. Every student and every citizen of this city where this school is located knows the traditions of this city and school, running through nearly a hundred years, respecting that matter. To admit a Negro into this school would, to my way of thinking, be subversive of discipline, which is so important on the campus, among the students and in the various departments of the University; and that was the thing that was considered, among other things, in ruling on this business. That is the duty of the Board of Curators under our constitution, yes,—it is the governing board of the school. Unusual, in some respects, is the authority given the Board of Curators. Now the government of the school includes its discipline. When we considered the constitution of '65, with the word "may" provide separate schools, and then a little later in the constitution where it said "shall"; and then read on down through the statutes to the consolidated schools, high schools, and then the Act of 1921, we were thoroughly persuaded that the law was clear and our duty, therefore, clear, as a matter of public policy evidenced by the statutes and constitution of the state and the well known traditions of the State of Missouri, and there was no other course open to us about that.

Mr. Hogsett: You may take the witness.

Cross Examination of F. M. McDavid

Mr. Houston: Q. Senator, in the cross examination let us start out with the assumption that we accord you good faith in this entire mat-

ter, so that in asking you the questions you will realize that we are always assuming good faith,—that is understood. We accord you that as a public official. You also took an oath to obey the Constitution of the United States, did you not?
A. Yes, sir.

Q. You would not set the Constitution of the State of Missouri over the Constitution of the United States, would you, sir? A. No, sir.

Q. Nor the traditions of Missouri,—would you? A. No, sir.

Q. And therefore if there came a conflict between the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of Missouri, as a public official you would be forced to recognize the priority of the Constitution of the United States? A. That matter is well known to the members of the Board and was very fully discussed,—very fully discussed. We did not act upon this hastily. It was a very serious question, and they handled it as such.

Q. May I say, also, that we consider it quite a serious question, and I think we are both approaching it in the same attitude. You spoke about a hundred years tradition in this state. Assuming the fact that, of course, nobody wants to suggest any paralysis of fear or to upset the people of the state of Missouri, you would at the same time allow that there will be some time when that tradition would not bind progress forever,—that would be true, would it? A. I don't know what you mean by "progress."

Q. Have you ever considered what the South

pays for a dual system of schools? A. I don't know that.

Q. Have you ever stopped to consider— A. I am quite familiar with the history of Missouri and quite familiar with its schools and with the University.

Q. You are familiar with the fact that at no place in the constitution does it say that Negroes shall not attend the State University of Missouri?

A. I do say that, in my judgment, no lawyer can read the statute of 1921 and not be convinced absolutely, if he is familiar with the nature of that body,—who would not be convinced that the thought was that that was the final capsheaf,—having direct connection with the common schools, consolidated schools, high schools, and now the University. And so they rebuild and recreate and make a new institution out of Lincoln Institute and make of it a University, and give to its Board of Curators the same power we have in connection with the University of Missouri. You can't read that statute without being convinced that the legislative will was to make the same rules apply to the University as to the common schools. They are building a University for the Colored people and the place where they are to be educated, and the University here for the white people, and the Boards have the same power with respect to each.

Q. Has there been any university established for the Negroes? A. I only know of Lincoln University.

Q. Do you know whether it is a university in fact? A. I do not know except I have full

confidence—I have read the language of the bill, and I have read the opinion of the Court construing the act. I consider it to be promissory and mandatory, and I assume the Board will try to do its duty. They can make it a “university” if they have not done so. The law so provides, and pending the full development of it—recognizing that it had not been fully developed at that time,—they could do certain other things which I will not discuss at this time.

Q. They give Negroes a piece of paper, while the white citizens have an actuality— A. How is that?

Q. Merely a piece of paper, just a legislative fiat, whereas the white citizens have an actual, existing School of Law? A. I would say that the Colored people would have no right to complain until they have made demand upon the body that had been given that power to create the thing which they wish. And until that time comes and they have made the demand—if the legislature has given the power to a certain body to create a university, that is the place to strike.

Q. Suppose the legislature was not to be in session during the academic year, when—as you have heard—there would not be any excess of money but a deficiency of money at the end of the appropriation year, and that there was no money for expansion,—what would you say a Negro was to do in the interim if he was growing older each day? A. Well, I hardly think that is a fair question, but I will try to answer it. I don’t think that education—

The Court: I will say, as far as this Court is concerned, unless you think it would be necessary to your record the Court is not interested in this testimony. I think that is just asking for a conclusion of Senator McDavid that the Court will have to make for itself.

The Witness: I think so, too.

To which ruling of the Court the relator, by his counsel, then and there at the time duly excepted and saved his exceptions.

Mr. Houston: No further questions, Your Honor.

(The witness leaving the stand.)

Mr. Houston: Just one question.

The Court: Come back to the stand.

And now the witness F. M. McDavid resumed the stand, testifying further as follows, to-wit:

Mr. Houston: Q. Senator, you are familiar with another case in which this same question arose, are you not,—against the University of Maryland? A. I have seen that case; yes, sir.

Q. You are familiar with the fact that in that particular case the Negro student was granted admission?

Mr. Cave: We object to that as immaterial. The decision speaks for itself.

Mr. Houston: Your Honor, I wanted to ask the next question,—it was that they had the same situation, probably, as Missouri and did they make any investigation to determine whether any breach of discipline had occurred in the University of Maryland as a result of this Negro student's presence?

The Court: If you had objected to the greater part of Senator McDavid's testimony, I would have sustained it. I am going to let him answer that question, but I don't think that the testimony was admissible in the first place.

Mr. Houston: Well, our side has been trying it with the door wide open so you can have the benefit of all the facts and circumstances.

The Witness: What was the question?

Mr. Houston: Q. You are familiar with the fact that the Negro boy was granted admission to the School of Law of the University of Maryland?

A. I think so.

Q. And you are familiar with the fact that Maryland has had the same public policy of education as Missouri? A. I don't know about that.

Q. Did you make any investigation, in considering the Gaines case, to find whether any disciplinary problems had arisen at the University of Maryland because of his presence? A. I thought the statute of 1921 created a distinction between the two cases and I now think so. I am not familiar with the state of Maryland. I am familiar with the history of Missouri and have been close to its problems and I think I know the temper of the people of Missouri. I think I was actuated by proper motives in determining what we had to do, and I think I was in accord with every other member of the Board on that subject.

Q. Did you ever put it up to the students to determine what they thought about it? A. If you had been a member of the Board of Cura-

tors as long as I have, with all respect to the student body, you would not, I think, submit to the students the government of the University any more than you would appeal to the crowd to overrule an umpire.

Q. But at the same time it is the students who would have to be on the same campus and in the same classroom? A. I can only use my best judgment as to the effect on the student body. I talked with a good many students about this. I don't hesitate to say that I think it would be a most unfortunate thing, an unhappy thing,—looked at from the interests of the student applying. I don't think he would be happy and I don't think the other crowd would be happy. I think it would be unfortunate for the education of the colored race and unfortunate for the support given and unfortunate for the support which would be given by the legislature to Lincoln University. That is one of the vital things in this case.

Q. You also understand that this suit about the Law School does not affect Lincoln University in the college department? A. I understand that.

Q. Senator, have you ever considered that Missouri is asking the other states to take Missouri's burden off its shoulders?

Mr. Hogsett: We object to that as an unfair question. The 1921 Act does not do anything of the kind.

The Witness: I don't understand we have made any such request.

Mr. Houston: Q. Or is it your position that

it is up to the Negro student to hunt around and decide where to go, and then you give him the money? A. Pending full development of the University. You can't create an institution or a law department in a day. Pending the full development of the school, the State is doing the best thing it can do in view of its well known policy to furnish the tuition of the student in another school where he would be happy, where he would get what he needed and would have an equal opportunity to get an education.

Q. But do you know that the State does not furnish the tuition? A. I don't know about that. I have heard the dispute here. I see there is some difference of opinion here,—that if he would have to pay \$50 here for tuition and only a certain amount more at the other place that the certain amount more would make him whole.

Q. That is your interpretation? A. Although I have not known of that situation and have not given it any consideration.

(Witness excused.)

Mr. Hogsett: I would like to recall Dean Masterson for further cross examination.

And now W. E. MASTERSON, being recalled, was duly produced and further examined, testifying as follows, to-wit:

W. E. Masterson Recalled

Mr. Hogsett: Q. Dean, in the light of the examination of Dr. Elliff about the establishment of a law school at Lincoln University,—I wanted to

ask you, as an educator and as Dean of the Law School here what, in practical effect, would have to be done to set up a law school at Lincoln University for the instruction in law of one or two students. Just tell us what you would do if you were setting out to do that. A. You must first have a library, of course. I understand they have that. Second, you would have a place for meeting the student and reciting with him. I understand they have that. Then, of course, you must have competent instruction to teach a full year curriculum. That would require, I should say, two teachers of law. That would give them just about the amount of law that the individual instructor on the faculty here has at this University.

Q. Now at what expense could a law school be established in Lincoln University for the instruction in Law of one or two students, to give them such law school and standard of training equal to that in the Missouri University Law School? A. Since you have the library there and the buildings,—about the only item of expense would be the salaries of those two instructors.

Q. What would that be, to get men of equal grade with what you have in Missouri University?

A. I should say that you could get very excellent teachers of Law varying from \$3500 to \$5000 a year.

Q. Assuming the top figure, could you establish a Law School in Lincoln University for the instruction of one or two students and on a level of scholarship and training equal to that in Mis-

Missouri University for a maximum of \$10,000 a year?
A. I think so.

Q. If, on the other hand, a Negro were admitted into the Law School of the University of Missouri, and educated in a separate class in accordance with the public policy of the state, would not that expense to the State of Missouri, to supply separate instruction in the Missouri University Law School be as great as it would to establish it in Lincoln University? A. It would, because our present teaching staff already have full classes. If we gave additional instruction, in separate classes, it would require two extra teachers.

Q. If there was a demand made upon Lincoln University Board of Curators to establish a law school in Lincoln for one or two men students, and capable men of the kind you have been talking about would be employed to instruct that one or two students, would they not, having the entire time and attention of their instructors, receive at least as adequate instruction, if not better,— A. They would receive—

Q. Than if they were members of a class of forty students? A. They would receive much better instruction.

Q. In the ordinary routine of instructing a class of forty students or thirty to fifty students, a student, in the nature of things, cannot recite often, can he? A. He cannot.

Q. But with one or two students having the attention of the instructor, he would be practically having a private tutor? A. He would.

Q. Is that of value to a student? A. Of great value.

Re-re-direct Examination of W. E. Masterson

Mr. Houston: Q. How did you get the idea that you didn't need a library if you are going to have a law school at Lincoln University? A. I said there would have to be a library.

Q. How did you get the idea they could have a school there without a library? A. You have the Library of the Supreme Court, which is accessible to these students.

Q. Do you mean to tell me that the Association of American Law Schools would recognize a law school that didn't have its own library?

Mr. Hogsett: That does not matter.

Mr. Williams: The only thing we are concerned with here is the education of this relator and whether he is denied equal protection. The only test of that is, what sort of an education he is going to get. The requirements as to the grade of a law school according to an association is one thing, but that does not affect, as has been shown here, the character of the education that the student gets. We are concerned here with the education of this relator. He says that he is not going to get the kind of education that he should and is denied equal protection. We say to him and are trying to prove, and think we have established, that he is getting an education equal to or better than an education that he would get by coming to Missouri University. Now the requirements set up among the law schools most certainly is not of the essence that goes to the subject mat-

ter of the Fourteenth Amendment. It does not necessarily follow that membership in an association of law schools would have any effect upon the education this man would get. It is wholly immaterial to the question of whether or not the law school that would be established at Lincoln University would give this man the same high grade of education he would get here,—or even better because of the fact that he is the only man who wants it. What we do say is that the State, in its generosity in giving this man his education, should not have to take into consideration whether the law school is to be in the organization or association of law schools. Isn't the test whether or not this student if he did the work, would be qualified as well as he would be if he came out of the best law school in this state, or the United States? As to whether or not this law school at Lincoln would be admitted to the Association of Law Schools would not raise the 14th Amendment. Missouri is not required to give this man a law school that will be admitted to an association of law schools. We are required not to discriminate against him in the education that he gets. Therefore, it is entirely immaterial, and is far afield.

Mr. Houston: Q. Let me ask a few preliminary questions, first. Have you been over to the State Law Library at Jefferson City and used it? A. I have walked around through it, but I have not used it.

Q. You haven't examined it critically? A. No.

Q. You don't know how it compares with the

library here at the University? A. Only as to size.

Q. Well, "size" does not make a library?

The Witness: Is this the library used by the Supreme Court?

Mr. Hogsett: Yes.

The Witness: Well, we can assume they keep it up to date and have a standard, good law library.

Mr. Houston: Q. But you don't know whether it is up to the standard of the University of Missouri Law Library? A. Yes, sir.

Q. Is the library here, and the room, for the use of the students and faculty? A. Primarily, but lawyers may come into it.

Q. On the other hand, the law library at the capital would not be run for the benefit of the student of Law in Lincoln University? A. I assume not, but I don't know. That is not under my jurisdiction.

Q. The law library of the University of Missouri is under the immediate control of the Faculty of Law, is that correct? A. Well, under the immediate control of the general University Librarian, with recommendations from the Law Faculty as to its conduct and upkeep.

Q. Do you know how far the State Library at Jefferson City is situated from the campus of Lincoln University? A. Not at all.

Q. You know nothing about the accessibility of the Library so far as Lincoln University is concerned, at all? A. No.

Q. Then why did you make the statement

that Lincoln University would not need a law library in case one student over there wanted Law? A. It was brought out in testimony here by somebody that those Negro students could use that library if they wanted to.

Q. Do you know about the distance? A. Somebody said it was four blocks.

Q. But you don't know? A. No, I don't know.

Mr. Hogsett: He said it was based on testimony here in court.

Mr. Houston: Who testified it was four blocks?

Mr. Hogsett: Mr. Elliott.

The Court: I don't think the matter of where the Supreme Court Library is or is not has anything to do with this. If you want to question him as to what it would take to have a School at Lincoln, you can question him on that; but I don't think the Supreme Court Library has anything to do with it.

Q. If a library were set up which conformed to the requirements of the American Association of Law Schools, it would cost over fifty thousand dollars, is that true? A. I can't answer that question. I would have to do quite a lot of figuring in connection with our law library here.

Q. Well, you know it would have to be ten thousand volumes? A. Yes, it must have that many volumes.

Q. Considering the volumes that would be out of print, or something,—you, as a legal educator, know it would average \$5 a volume? A. Some

of those volumes we haven't, ourselves.

Q. Could you duplicate the University of Missouri library for fifty thousand dollars? A. I could not say,—I don't know.

Q. What is your best opinion as the Dean of an approved Law School? A. Well, I think I would have to have a little time, with a pencil and piece of paper and 20 or 30 minutes.

Q. Then may we ask for the answer, after this 20 or 30 minutes? It is also quite true that one of the advantages of the Association school is to transfer back and forth, as the student desires? A. That is right.

Q. So, if, for any reason, the work at Lincoln University would be unsatisfactory, an Association school could not accept this student as a transferee, coming from a non-Association school? A. That is the general rule.

Q. And some of the greatest value of your instruction in Harvard was the class-room instruction, that is true? A. That has a great deal of value, yes. Some of the great disadvantage of the instruction that you refer to was the infrequency with which the student was called upon to recite.

Q. But that didn't keep him from taking part in the discussions? A. No, he could talk out.

Q. And that participation depended on himself? A. Well, of course, he could not monopolize it.

Q. Within reasonable limits? A. Yes, sir.

Q. And that was a very valuable part of the training? A. Yes, but you would get more with two or three students in the class.

Q. But if you had only one student, you would lose all that? A. What he would lose from the discussion is not relevant because he would get it from the instructor more directly and it would be time-saving, because, you know, yourself, when you were in the Harvard Law School, a great many questions were sheer nonsense.

Q. But sometimes it was the "nonsense" that made you learn, wasn't it?

The Court: Well, let us get along. The Court is pretty well informed on that.

To which ruling of the Court, the relator, by his counsel, then and there at the time duly excepted and saved his exceptions.

(Witness excused.)

And the respondents recalled as a witness N. T. GENTRY, who, being duly produced and examined, testified further as follows:

N. T. Gentry, Recalled

Mr. Cave: Q. Judge Gentry, I believe you said you had been a member of the Supreme Court of the State of Missouri and Attorney General of the State of Missouri? A. Yes, sir.

Q. And during your active practice—

The Court: Are you going to ask Judge Gentry some more about this Supreme Court library?

Mr. Cave: I want to ask him about the size of it and the books that are there in. He has raised that question. This witness is one who knows.

Mr. Houston: We can trust Your Honor to eliminate the irrelevant.

Mr. Cave: Unless they will admit it is a good one, we want to prove it.

Mr. Cave: Q. I will ask you whether or not the library maintained in the Supreme Court building is an excellent law library, with law reports and decisions from each state in the Union and from England and Canada; and textbooks and digests of various kinds? A. Yes, sir.

Q. How would you say it compares with the law library at the University of Missouri? A. I think it is a larger and better law library. I frequently go over there to consult text books and reports that I don't find in the University law library.

Mr. Houston: Q. When court is not in session, is it open at night? A. Yes, I have been there at ten o'clock at night.

Q. You were a Judge? A. I was not then.

Q. Is it open to the public at night? A. Yes, sir; I have seen various lawyers there at night.

Q. When court was not in session? A. Yes, sir.

(Witness excused.)

Mr. Hogsett: Respondents rest.

RELATOR'S REBUTTAL

The relator, in rebuttal, offered and introduced

evidence as follows, to-wit:

Mr. Houston: May it please the Court, from the Bulletin of the University of Kansas, marked Respondents' Exhibit 9, I call your attention to page 110, the following language: (reading) "Especial emphasis, however, is——"

The Court: Was that offered by the respondents?

Mr. Hogsett: Yes, Your Honor. Well, maybe not. You had better make your offer.

Mr. Houston: (Reading) "Especial emphasis, however, is placed upon the study of Kansas court decisions, statutes, and methods of practice."

In Respondents' Exhibit No. 12, from the Bulletin of the University of Iowa, the statement on page 295, (reading) "Special attention is given to the needs of students who intend to practice in Iowa."

Mr. Hogsett: May I call to the Court's attention the following: (reading from pages 294 and 295 of the same exhibit) "The primary purpose of the school is to prepare students for the general practice of law in any jurisdiction where the system of Anglo-American law prevails, to promote legal scholarship and research, and to develop an adequate understanding of the relation of law to the other social sciences."

Mr. Houston: And then follows the statement that "special attention is given to the needs of students who intend to practice in Iowa."

Mr. Houston: Now from Respondents' Exhibit 11, it states—page 12—"Under the statutes

of Nebraska, admission to the Bar is to be had in the Supreme Court only, and is governed by rules established by that court. Graduates of the College of Law of the University of Nebraska are admitted to practice in Nebraska upon motion, without examination other than that prior to graduation."

Mr. Hogsett: From the University of Kansas Bulletin, we will offer the sentence, "The curriculum is so planned as to prepare for practice in any jurisdiction."

Mr. Houston: Then we should like to offer in evidence the Bulletin of the State University of Iowa, marked Relator's Exhibit U, page 7, (reading, "The Iowa Law Review, published quarterly, is devoted to the scientific study and investigation of the law, and gives particular attention to problems of interest to the Bar of Iowa.")

Said Relator's Exhibit U, offered as aforesaid, is in words and figures as follows, to-wit:

(Clerk here copy)

And now, further in rebuttal, the relator recalled as a witness **ROBERT L. WITHERSPOON**, who, being duly produced and examined testified as follows, to-wit:

Robert L. Witherspoon, Recalled

Mr. Houston: Q. Do you know the Eden Theological Seminary at Webster Groves near St. Louis? A. I do.

Q. What kind of school is it? A. It is a theological seminary.

Q. Do you know whether both white and Negro students matriculate there? A. I do.

Q. Do you know anything about the living accommodations? A. I do know that the white and colored live in the same dormitory.

Mr. Hogsett: Q. Is that a public or private school? A. It is a private school.

(Witness excused.)

Mr. Houston: Relator rests.

And here the relator closed his case.

And here the respondents closed their case.

And this is all the evidence in the case.

And now this cause was submitted and taken under advisement by the court until a day later in this term of court, with leave to the parties relator and respondent to submit briefs.

And thereafter, on Friday, the 24th day of July, 1936, the same being also one of the days of the regular June, 1936, term of this court, the

following proceedings were had herein, to-wit:

Messrs. Murray and Hulen appeared for respondents. No appearances for relator.

The Court announced receipt by mail on July 15, 1936, from counsel for relator of requested finding of facts and requested conclusions of law, same being, respectively, in words and figures as follows, to-wit:

FINDING OF FACTS

(Caption omitted)

Requests having been made for a finding of facts separate from conclusions of law, the Court in compliance therewith does find from the evidence:

1. That Lloyd L. Gaines is a Negro citizen of the United States and the State of Missouri, resident in the City of St. Louis; twenty-four years of age, and has resided in the State of Missouri for the last ten years; and is a taxpayer.

2. That he desires to study law at the University of Missouri School of Law, and is mentally and morally qualified for admission to the first year class of the School of Law according to the rules and regulations pertinent thereto.

3. That in August, 1935, he applied to respondent S. W. Canada, Registrar of the University of Missouri for admission to the School of Law. The transcript was duly forwarded and Canada telegraphed him suggesting that he communicate with President Florence of Lincoln University regarding possible arrangements and fur-

ther advice. President Florence wrote Gaines about the provisions for state scholarships for Negro students to study outside the state the same subjects offered at the University of Missouri and not offered at Lincoln. Gaines did not apply for a scholarship but persisted in his attempt to matriculate in the School of Law of the University of Missouri.

4. That before applying for admission to the School of Law of the University of Missouri Gaines had made inquiries of the law schools of several other state universities but had decided that since he was planning to practice in Missouri the School of Law of the University best offered him what he wanted; that the School of Law of the University of Missouri through student editor work offered the opportunity to do special research in Missouri law and he felt he would become more familiar with Missouri law and procedure attending the School of Law of the University of Missouri than any other law school. He did not believe it was against the law to admit a Negro to the University of Missouri School of Law. He is ready and able to pay the tuition fees and conform to the uniform regulations governing students in said School of Law.

5. On March 27, 1935, the Board of Curators formally rejected Gaines' application under the following resolution:

"WHEREAS, Lloyd L. Gaines, colored, has applied for admission to the School of Law of the University of Missouri, and

"WHEREAS, the people of Missouri,

both in the Constitution and in the statutes of the State, have provided for the separate education of white students and Negro students, and have thereby in effect forbidden the attendance of a white student at Lincoln University, or a colored student at the University of Missouri, and

"WHEREAS, the Legislature of the State of Missouri, in response to the demands of the citizens of Missouri has established at Jefferson City, Missouri, for Negroes, a modern and efficient school known as Lincoln University, and has invested the Board of Curators of that institution with full power and authority to establish such departments as may be necessary to offer to students of that institution opportunities equal to those offered at the university, and have further provided, pending the full development of Lincoln University, for the payment, out of the public treasury, of the tuition, at universities in adjacent states, of colored students desiring to take any course of study not being taught at Lincoln University, and

"WHEREAS, it is the opinion of the Board of Curators that any change in the State system of separate instruction which has been heretofore established, would react to the detriment of both Lincoln University and the University of Missouri,

"THEREFORE, BE IT RESOLVED, that the application of said Lloyd L. Gaines

be and it is hereby rejected and denied, and that the Registrar and the Committee on Entrance be instructed accordingly."

Thereupon April 15, 1935, Gaines filed the instant suit.

6. The University of Missouri is a public institution, operated and controlled by the board of curators, a body corporate, as an administrative agency of the State of Missouri. The School of Law is an integral part and division of the University. Admission to the School of Law is in the hands of the respondent S. W. Canada, Registrar, as agent of the Board of Curators. The University admits students of every race, both resident and foreign, except students of African descent.

7. The School of Law of the University of Missouri is the only public institution in the State of Missouri offering a degree in law or preparing students for the practice of the profession of the law.

8. Lincoln University is under the control of a board of curators who by the Laws of 1921, p. 86, were given the same powers as the board of curators of the University of Missouri and authorized and directed to reorganize the institution so that it should afford Negroes opportunity for training up to the standard furnished at the University of Missouri, to purchase additional land and necessary buildings. By the same act it was further provided that pending the full development of Lincoln University the board of curators

should have the authority to arrange for the attendance of Missouri Negroes at the university of any adjacent state to take any subject or course offered at the University of Missouri but not at Lincoln and to pay the reasonable tuition fees for such attendance; provided that whenever the board of curators deemed it advisable they should have the power to open any necessary school or department.

9. "That Lincoln University does not now and never has offered any graduate or professional instruction; specifically, no instruction in law; that the only instruction offered is undergraduate collegiate instruction. At present a survey is being made by the board of curators with a view of possible expansion of the university, but no program of expansion has been agreed upon. No money is available to finance a program of expansion; and this coming school year the University officials will have to turn away some girl applicants for lack of space in the girls' dormitories. The University will wind up the present fiscal biennium with a deficit even without any expansion.

10. The scholarship provisions have never been administered by the board of curators of Lincoln University as provided in the Act of 1921, but have been administered by the office of the State Superintendent of Education. Down to 1936 the entire tuition of the Negro student was paid in the university of the adjacent state, but beginning this year under the interpretation of the appropriation Act of 1935, the state pays only the differential between the cost of the tuition in the

adjacent state university and the cost of tuition for the same course or subject at the University of Missouri. If the cost of the tuition at the adjacent state university is lower than that of the University of Missouri, the Negro student gets nothing.

11. Gaines did not apply to the board of curators of Lincoln University demanding either that a law school be established for him at Lincoln University or that he be given a scholarship as provided under the Act of 1921, *supra*.

Judge.

CONCLUSIONS OF LAW

(Caption omitted)

The Court declares the law to be:

1. The University of Missouri is a public institution operated by the State of Missouri by and through its agency the Board of Curators, a body corporate; that there is no valid prohibition in the Constitution or statutes of the State of Missouri against a Negro Citizen of Missouri, otherwise fully qualified, from attending the School of Law of the University of Missouri on the ground he is a Negro.

2. The Board of Curators of the University of Missouri, a body corporate, and the agent of the Board, the Registrar of the University, are under a plain, legal duty not to refuse admission to a Negro student, resident of Missouri, other-

wise fully qualified, to the School of Law of the University of Missouri, on the ground of race or color; and rejection of such qualified Negro student on the ground of race or color violates the Constitution of the State of Missouri and the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

3. Mandamus will lie against the said Board of Curators and the said Registrar to compel the admission of an otherwise fully qualified Negro student, resident of Missouri, to the School of Law of the University of Missouri upon his paying the uniform fees and meeting the uniform requirements governing admission to the first year class of said School, at its next regular matriculation period, where said Negro has been rejected solely on account of race or color.

4. The respondents admitting of record that relator is mentally and morally qualified for admission to the first year class of the School of Law of the University of Missouri, the burden of proof is on them to show legal authorization for excluding him solely on the ground of color. The respondents have not sustained the burden of proof on this issue.

Judge.

And now the Court refused to give said finding of facts, so requested by relator as aforesaid; to which ruling of the Court the relator, by his

counsel, then and there at the time duly excepted and saved his exceptions.

And now the Court refused to give said declarations of law, so requested by relator as aforesaid; to which ruling of the Court the relator, by his counsel, then and there at the time duly excepted and saved his exceptions.

The finding of the Court is for the respondents and against the relator and the writ of mandamus is quashed.

To which ruling of the Court the relator, by his counsel, then and there at the time duly excepted and saved his exceptions.

And now the Court caused its finding, decree and judgment to be entered herein as is fully set out in the record proper, q. v.

And now on the same day and at the same term comes relator and files his motion for a new trial herein, which motion is now by the parties presented to the court, and the court being fully advised doth now order that said motion for a new trial be and the same is now overruled, to which ruling and order relator excepts.

And now upon application of relator it is by the court ordered that the relator may file his bill of exceptions within the time provided by law.

And now on the same day and at the same term comes relator and files his application and affidavit for an appeal from the judgment herein to the Supreme Court of Missouri, which application is now by the court sustained and an appeal is now by the court allowed to the relator from the judgment herein to the Supreme Court of Missouri.

And now, on said 24th day of July, 1936, same being also within four days after finding, decree and judgment herein, and at the same term thereof, the relator filed his motion for a new trial, same being in words and figures as follows, to-wit:

MOTION FOR A NEW TRIAL

(Caption omitted)

Comes now the relator, within four days after the rendering of the verdict and judgment and yet within the same term, and moves the Court to set aside its verdict and judgment and grant him a new trial in the above styled cause for the following reasons:

1. The verdict and judgment of the Court are for the wrong party.
2. The verdict and judgment of the Court are against the weight of the evidence and contrary to the law.
3. The Court erred in refusing the finding of facts and conclusions of law offered by relator.
4. The verdict and judgment of the Court are contrary to and in violation of Section 30, Article 2 of the Constitution of the State of Missouri for the reason that they deprive relator of his property without due process of law.

5. The verdict and judgment of the Court are contrary to and in violation of the 14th amendment of the ~~Constitution~~ Constitution of the United States for the reason that they deprive relator of his property without due process of law and of the equal protection of the law.

6. The Court erred in its finding of facts and conclusions of law.

7. The Court erred in holding that mandamus would not lie against the respondents to compel them to admit relator into the School of Law of the University of Missouri.

S. R. REDMOND,

CHARLES H. HOUSTON,

HENRY D. ESPY,

Attorneys for Relator.

Which motion for a new trial, filed by relator as aforesaid, was by the Court now duly seen and heard, and was by the Court overruled; to which action and ruling of the Court the relator, by his counsel, then and there at the time duly excepted and saved his exceptions.

And now, also, on the 24th day of July, 1936, the same being one of the days of the regular June, 1936, term of this court, the relator filed his application and affidavit for an appeal herein, same being in words and figures as follows, to-wit:

APPLICATION AND AFFIDAVIT FOR APPEAL

(Caption omitted)

State of Missouri, City of St. Louis, ss.

Lloyd L. Gaines, being duly sworn, makes oath and says that the appeal prayed for in the above entitled cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the Court.

Lloyd L. Gaines.

Subscribed and sworn to before me this 24th day of July, A. D. 1936.

Arnett G. Lindsay,

Notary Public

(SEAL)

My commission Expires April 16th, 1937.

And now the relator was by the Court given leave to prepare and file his Bill of Exceptions herein within the time allowed by law.

And now the relator was by the Court granted an appeal herein to the Supreme Court of the State of Missouri, as prayed.

And now, within the time allowed by law, comes the relator, by his counsel, and presents this his Bill of Exceptions herein and prays the Court to sign, seal, allow, settle and file the same and make it a part of the record in this cause.

And this is accordingly done on this the 5th day of October, 1936.

W. M. DINWIDDIE,
*Judge of the Circuit Court, County
of Boone, State of Missouri.*

This Bill of Exceptions is hereby approved and agreed to:

S. R. REDMOND,
CHARLES H. HOUSTON,
HENRY D. ESPY,
Counsel for Relator.

FRED L. WILLIAMS,
WILLIAM S. HOGSETT,
N. T. CAVE,
Counsel for Respondents.

On July 27, 1936, appellant caused to be filed in the office of the clerk of the Supreme Court of Missouri a certified copy of the record entry of the judgment appealed from in this cause, showing the term, day of the term and month and year when the same was rendered, together with the order of the Court granting the appeal herein and the docket fee of ten (\$10.00) dollars was paid to said clerk and said cause is now pending on appeal in said Court.

The foregoing is submitted by appellant as and for an abstract of the record in this cause.

S. R. REDMOND,
CHARLES H. HOUSTON,
HENRY D. ESPY,
Attorneys for Appellant.

[fol. 209] And thereafter, and on the 18th day of May 1937, the following further proceedings were had and entered of record in said cause, to-wit:

35286

STATE ex Rel. LLOYD L. GAINES, App.

vs.

S. W. CANADA, etc., et al., Resps.

Come now the parties, by their respective attorneys, and after arguments herein submits this cause to the court.

And thereafter, and on the 9th day of December, 1937, the following further proceedings were had and entered of record in said cause, to-wit:

STATE OF MISSOURI, at the Relation of LLOYD L. GAINES,
Appellant,

vs.

S. W. CANADA, Registrar of the University of Missouri,
and the Curators of the University of Missouri, a Body
Corporate, Respondents

Appeal from the Circuit Court of Boone County

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Boone County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondents recover against the said appellant their costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion of the court is in words and figures following, to-wit:

[fol. 210] IN THE SUPREME COURT OF MISSOURI, EN BANC,
SEPTEMBER TERM, 1937

No. 35286

STATE OF MISSOURI at the Relation of LLOYD GAINES,
Appellant,

vs.

S. W. CANADA, Registrar of the University of Missouri,
and the Curators of the University of Missouri, a Body
Corporate Respondents

Action in mandamus to compel the registrar and the curators of the University of Missouri to admit relator, a negro, as a student in the School of Law in the University of Missouri. The action was tried in the Circuit Court of Boone County. On final hearing the alternative writ was quashed and a peremptory writ was denied. Relator appealed.

The unchallenged pleadings sufficiently present the issues urged on this appeal.

Appellant, a young man twenty-five years of age, is a citizen of Missouri, and resides in the City of St. Louis. He was educated in the public schools maintained by the state for the education of negroes including education in the common school, high school and Lincoln University. He was graduated from the Lincoln University in August, 1935, with an A. B. degree, and thereupon made application for admission as a student in the School of Law in the University of Missouri. Respondents denied such application on the ground that it is contrary to the constitution, laws and public policy of the state to admit a negro as a student in the University of Missouri.

Other necessary facts will be stated in connection with the questions discussed.

[fol. 211] At the trial below, it was admitted that appellant's work and credits at the Lincoln University would qualify him for admission to the School of Law of the University of Missouri if he were found otherwise eligible.

Appellant contends that the constitution, laws and public policy of the state entitle him to admission as a student in the Law Department of the University of Missouri.

Section 3 of Article XI of the Constitution of Missouri provides as follows:

"Separate free public schools shall be established for children of African descent."

Section 9216 R. S. 1929 provides:

"Separate free schools shall be established for the education of children of African descent; and it shall hereinafter be unlawful for any colored child to attend any white school, or for any white child to attend a colored school."

Section 9217 R. S. 1929 makes the following provision:

"When there are within any district in the state eight or more colored children of school age, as shown by the last enumeration, the board of directors of such school district shall be and they are hereby authorized and required to establish and maintain within such school district a separate free school for said colored children or in lieu thereof shall pay the transportation and the tuition charges to any district in the county wherein a school is maintained for colored children. Provided if the number of colored children enumerated is less than eight they shall have the privilege and are entitled to attend school in the nearest district in the county wherein a school is maintained for colored children and the transportation and tuition charges incurred shall be paid."

[fol. 212] Without enumerating the provisions of Sections 9346, 9347, 9348 and 9349 R. S. 1929, it will be sufficient for present purposes to state that such statutes provide separate high school facilities for colored students equal to those provided for white students.

The public policy of a state is evidenced by the constitution, statutory laws, course of administration and decisions of the courts of last resort of the state. It is clear that the constitutional and statutory provisions to which we have called attention provide separate public schools for the education of colored children. In the administration of these

constitutional and statutory provisions, separate schools have been established and maintained for that purpose. This court has held that the constitution and laws of this state providing separate schools for colored children are not forbidden by, or in conflict with, the Fourteenth Amendment of the Federal Constitution, and do not deprive colored children of any rights. *Lehew v. Brummell*, 103 Mo. 546, 552, 15 S. W. 765. It follows, therefore, that the established public policy of this state has been and now is to segregate the white and negro races for the purpose of education in the common and high schools of the state. Appellant contends, however, that the public policy of the state does not require the separation of the races for the purpose of higher education. That question we take next.

There is no express constitutional provision requiring that the white and negro races be separated for the purpose of higher education. Neither is there any constitutional prohibition against such a separation. Our state constitution is not a grant but a limitation on legislative power, so the legislature may enact any law not expressly or impliedly prohibited by the Federal or State Constitution. *State ex rel. McDonald v. Lollos*, 326 Mo. 644, 33 S. W. (2d) 98; *State ex rel. Crutcher v. Koeln*, 332 Mo. 1229, 61 S. W. (2d) 750; *State v. Dixon*, 335 Mo. 378, 73 S. W. (2d) 385. It must follow, therefore, that since there is no constitutional prohibition against the separation of the white and negro races for [fol. 213] the purpose of higher education, the legislature has authority to enact laws providing for such separation. This conclusion brings us to two questions, (1) has the legislature enacted laws providing for the separation of the two races for the purpose of higher education? and (2), if so, do such laws run counter to any constitutional provision, State or Federal?

The laws enacted by the legislature of this state providing higher education for the negro are fairly summarized in respondents' brief as follows:

"In 1870 the General Assembly enacted a statute entitled 'An Act establishing a State Normal School for colored teachers', wherein it was provided that the 'the Lincoln Institution, at Jefferson City, is hereby constituted a State Normal School, for the purpose of training colored teachers for public schools' (Laws, 1870, p. 136). This statute, enacted five years after the close of the Civil War, is the first

statute providing higher education for negroes. This Statute was carried forward as Section 7176, R. S., 1879. To this statute was added Section 7177, R. S., 1879, providing that the foregoing section "shall not be so construed as to affect or abolish the Lincoln Institute or in anywise to interfere with the objects as contemplated by the original articles of incorporation, but said State Normal School shall be considered as a normal department in said institution for the education of colored teachers for public schools."

"In 1887 the General Assembly enacted a statute entitled "An Act to establish an academic department in connection with Lincoln Institute *for the higher education of the negro race,*" which statute established in Lincoln Institute an academic department for such higher education, including a college and preparatory school for said college; and authorized the board of regents "*as the growing necessities of this department may demand to introduce such studies as are pursued in the academic department of the State University,*" with power to employ necessary instructors (Laws, 1887, p. 270). This statute was carried forward as Sections 8140 and 8141, R. S., 1889.

"In 1891 the General Assembly enacted a statute establishing an industrial school as a department of Lincoln Institute, "in order that *the negro youths of this state* may receive instruction in those branches of study relating to agriculture and mechanic arts, and thereby fit themselves to engage in the useful trades". This statute further provided for an equitable division of certain federal grants of money between the agricultural and mechanical college and School of Mines and Metallurgy "*established exclusively for the benefit of white students,*" and the agricultural and mechanical college at Lincoln Institute established "*for the exclusive benefit of colored students*" (Laws 1891, pp. 22-23, Secs. 1 and 6). This act greatly enlarged the scope of education provided for negroes at Lincoln Institute. The act demonstrates that the State of Missouri was aware of the growing need for negro education and was responding to the obligation to provide it. This act was carried forward through subsequent revisions to and including the Revision of 1919 (R. S. 1919, Secs. 11511 to 11521, inclusive).

"In 1921 the present Lincoln University Act was enacted (Laws, 1921, page 86). The title of that act is most significant as indicating the legislative intent, and, therefore, the

public policy of the State, in this matter. The title, in part, reads as follows:

"An Act to repeal Article XVIIa, Revised Statutes of Missouri, 1919, * * * and to enact a new article in lieu thereof * * *, the same to provide for the organization and scope of the Lincoln University *for the higher education of the negro race*'".

This same public policy is reiterated and emphasized in the body of the act, particularly in Section 3 thereof, where [fol. 215] it says that "the Board of Curators of the Lincoln University shall be authorized and required to reorganize said institution *so that it shall afford to the negro people of the state opportunity for training up to the standard furnished at the State University*'" (Sec. 9618, R. S., 1929). This policy as to segregation of the races in higher education is still further clearly fixed by Section 7 of the Act providing that "pending the full development of the Lincoln University" the board of curators shall have authority to arrange for the attendance of "negro residents of the state" at the university of any adjacent state to take courses of study provided at the state university but which are not taught at Lincoln University and to pay the reasonable tuition fees for such attendance. (Sec. 9622, R. S., 1929)."

All of the foregoing statutes show a clear intention on the part of the legislature to separate the white and negro races for the purpose of higher education. The provisions of the 1921 Lincoln University Act, if it stood alone, would leave no doubt on that subject. Sections 3 and 7 of that act (now sections 9618 and 9622 R. S. 1929) are couched in language too plain to be misunderstood.

The provisions of section 9618 evidence a clear intention on the part of the legislature to give to the negro and white people of the state equal opportunity for higher education, but in separate schools. Why provide by section 9618 that Lincoln University, a negro school, should be reorganized so that it would afford the negro people of the state opportunity for training up to the standard furnished at the University of Missouri, if the negroes already had, or if the legislature intended they should have the opportunity for training at the University of Missouri by becoming a student therein? The answer is obvious. It is clear that the legislature intended to bring the Lincoln University up to the

standard of the University of Missouri, and give to the whites and negroes an equal opportunity for higher education—the whites at the University of Missouri, and the negroes at Lincoln University.

The provisions of section 9622 to the effect that negro [fol. 216] residents of this state may attend the university of any adjacent state with their tuition paid, pending the full development of Lincoln University, makes it clear that the legislature did not intend that negroes and whites should attend the same university in this state.

Appellant contends that section 9657 R. S. 1929 opens the doors of the University to negroes. This statute reads as follows:

“All youths, resident of the state of Missouri, over the age of sixteen years, shall be admitted to all the privileges and advantages of the various classes of all the departments of the university of the state of Missouri, without payment of tuition: * * * *and provided further*, that nothing herein enacted shall be construed to prevent the board of curators from collecting reasonable tuition fees in the professional departments, and the necessary fees for maintenance of the laboratories in all departments of the university, and establishing such other reasonable fees for library, hospital, incidental expenses or late registration as they may deem necessary. (R. S. 1919, Sec. 11554).”

Appellant seems to hang his contention on the words “all youths.” The argument appears to be that when the legislature provided that all youths, residents of the State of Missouri, over the age of sixteen years, should be admitted to the privileges and advantages offered by the University of Missouri without payment of tuition, it intended by the use of the words, all youths, to include negro as well as white youths. Such a construction of this statute, standing alone, would be at war with the provisions of the act of 1870, the act of 1887, the act of 1891 and finally the present Lincoln University Act of 1921, the provisions of which we have heretofore pointed out, as evidencing a clear and unmistakable intention on the part of the legislature to separate the races for the purpose of higher education.

What is now section 9657 was first enacted in 1872. The 1872 act provided that “all youths” resident of the State of Missouri between certain ages should be admitted to the privileges of the University of Missouri upon payment of a

[fol. 217] tuition fee of ten dollars, and such fees as the board of curators might establish, not to exceed five dollars per term. This section was amended through the years and now appears as section 9657. It now provides that all youths residents of the State of Missouri, over the age of sixteen years, shall be admitted to all the privileges of the University of Missouri without payment of tuition, but authorizes the board of curators to exact the payment of fees in certain named departments.

This statute deals with the question of tuition and fees to be paid for higher education. It must, therefore, be read and construed in connection with all other statutes dealing with the subject of higher education. The legislature could have had no purpose in adopting the 1887 Act, the 1891 Act and finally the 1921 Lincoln University Act, all providing for the development and reorganization of the Lincoln University, "so that it shall afford to the negro people of the state opportunity for training up to the standards furnished at the State University of Missouri", if, as appellant contends, the prior Act of 1872 gave them opportunity for higher education at the University of Missouri. The history of the Act of 1872 (now section 9657) when read in connection with later enactments providing for higher education of the negro at Lincoln University forces the conclusion that the purpose of the Act of 1872 was to regulate tuition and fees to be exacted from those admitted to the University of Missouri, and not to define eligibility for admission. This construction of the 1872 Act is not only reasonable but it harmonizes with the statutes segregating the races for the purpose of higher education and effectuates the evident intention of the legislature.

It is urged that the refusal to admit appellant as a student in the University of Missouri denies him the equal protection of the laws, in violation of the equal protection clause of the Fourteenth Amendment.

We have held that the statute establishing separate schools for colored children does not violate the Fourteenth [fol. 218] Amendment. *Lehew v. Brummell*, 103 Mo. 546, 15 S. W. 765. In that case Brummell, a negro, had four children of school age residing with him in school district number four in Grundy County. No separate school was maintained in that district for the education of colored children.

There was such a separate school in the town of Trenton in the same county, which these colored children could have attended with transportation and tuition fees paid. The trial court perpetually enjoined these colored children from attending the school maintained for white children, in district four. On appeal we affirmed the judgment of the trial court. In so holding, we, among other things, said:

"But it will be said the classification now in question is one based on color, and so it is; but the color carries with it natural race peculiarities which furnish the reason for the classification. There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated. These differences create different social relations recognized by all well-organized governments. If we cast aside chimerical theories and look to practical results, it seems to us it must be conceded that separate schools for colored children is a regulation to their great advantage".

In this same case we further said:

"The fact that the two races are separated for the purpose of receiving instruction deprives neither of any rights. It is but a reasonable regulation of the exercise of the right. As said in the case just cited, 'Equality and not identity of privileges and rights is what is guaranteed the citizen'. Our conclusion is that the constitution and laws of this state providing for separate schools for colored children are not forbidden by or in conflict with, the Fourteen Amendment of the Federal Constitution; and the courts of last resort in several states have reached the same result".

In *Plessey v. Ferguson*, 163 U. S. 537, 544, that court [fol. 219] spoke concerning race separation as follows:

"Laws permitting, and even requiring, their separation in places where they are liable to be brought in contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not uniformly, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced".

The right of a state to separate the races for the purpose of education is no longer an open question. Speaking to that question in *Gong Lum et al v. Rice et al*. 275 U. S. 78, 85, 86, the Supreme Court of the United States said:

"The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black. Were this a new question, it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution". (Citing many cases.)

Contention is made that the judgment of the court below upholding respondents' refusal to admit appellant as a student in the University of Missouri is violative of Section 30 of Article II of the Constitution of Missouri in that it deprived him of his property without due process of law.

The argument is that since appellant is a citizen and taxpayer of Missouri, he has a proprietary interest in the University of Missouri, and to refuse him admission as a student therein deprives him of such proprietary interest without due process of law in violation of Section 30 of Article II of the Constitution of Missouri. There is no question but what negro citizens and taxpayers of Missouri are entitled to school advantages substantially equal to those furnished white citizens of the state. However, equality and not identity of school advantages is what the law guarantees to every citizen, white or black. Since it is settled law that the mere separation of the races for the purpose of education deprives neither of any rights, the remaining question is whether or not the advantages for higher education offered to the negroes of the state are substantially equal to the advantages furnished white students. If they are, appellant is not deprived of his proprietary rights or any other right guaranteed to him by the State or Federal Constitution.

Appellant made no attempt to avail himself of the opportunities afforded the negro people of the state for higher

education. He at no time applied to the management of the Lincoln University for legal training. Had he done so it would have been the duty of the board of curators to either provide a law school for him at Lincoln University as provided in section 9618, or furnish him opportunity for legal training elsewhere, substantially equal to that furnished white students at the University of Missouri, as provided in section 9622. The universities of the adjacent states of Kansas, Nebraska, Iowa and Illinois, admit non-resident negroes as students in their law department. The law department of these universities, as well as the law department of the University of Missouri are schools of high standing. They are each members of the Association of American Law Schools, and each are on the approved list of the American Bar Association. Evidence offered by appellant shows that one desiring to practice law in Missouri can get as sound, comprehensive, valuable legal education in the law schools of Kansas, Nebraska, Iowa and Illinois, as in the University of Missouri. Appellant's evidence further shows that the system of education used in the law schools of the four adjacent states is the same as that used in the University of Missouri Law School, and is designed to give the student a basis for the practice of law in any [fol. 221] state where the Anglo-American system of law obtains; that the University of Missouri Law School does not specialize in Missouri law; that the course of study and case books used in the five schools are substantially identical; that students frequently transfer from one of these schools to the other, receive full credit for the work done in the former school, and pursue their course without loss of time. The record shows that out of 6966 cases in the case books used in the three-year course in the Missouri Law School, only 97 or 1.2% of all such cases are from Missouri.

The distance appellant would be required to travel from his home to these universities as well as the cost of transportation follows:

	Mileage	Transportation
"St. Louis to Columbia, Missouri	146	\$ 2.95
St. Louis to Champaign, Illinois	174	3.48
St. Louis to Iowa City, Iowa	299	5.98
St. Louis to Lawrence, Kansas	319	6.38
St. Louis to Lincoln, Nebraska	468	9.35

The record shows that white residents in some parts of Missouri travel farther to reach the University of Missouri at Columbia, than appellant would have to travel from his home in St. Louis to the university in either of the four adjacent states. A resident of Caruthersville, Missouri, would have to travel 367 miles, while a resident of Jefferson City, Missouri, would travel only 31 miles to reach the University of Missouri, yet, the Caruthersville resident could not claim he was discriminated against or assert that he was entitled to have a university located within 31 miles of his residence so that he and the Jefferson City resident would have equal opportunity to obtain a university education. "The law does not undertake to establish a school within a given distance of anyone, white or black". The difference in distances to be traveled, if not unreasonable or discriminatory, is but an incident to any classification for school purposes and furnishes no substantial ground for complaint. *Lehew v. Brommell*, 103 Mo. 546, 552, 15 S. W. 765; *People ex rel. King v. Gallagher*, 93 N. Y. 438, 451-2.

If plaintiff were permitted to attend Missouri University, [fol. 222] he would necessarily pay living expenses away from his home, the same as if he attended the university in either of the four adjacent states. If he attended the Law Department of either of the foreign universities, the State of Missouri would pay his attendance fees, which for the first year, would range from \$109.75 to \$178.00. If he attended the Law Department of the University of Missouri, he would be required to pay his attendance fees, which for the first year would be \$127.50.

The pertinent parts of the 1935 appropriation act read as follows:

"There is hereby appropriated out of the State Treasury chargeable to the general revenue fund for the years 1935 and 1936, the sum of Ten Thousand Dollars (\$10,000.00) to be used in paying the tuition of negro college students to some standard college or university not located in Missouri, * * *; provided that the total amount paid shall not exceed the difference between the registration and incidental fees charged by the University of Missouri to resident students and the school attended for similar courses."

At the time appellant applied for admission to the Missouri Law School in August, 1935, there was an unexpended

balance of \$6,351.18 in this scholarship fund. On April 17, 1936, the amount remaining in this fund was \$2,214.98. It thus appears that there was ample funds on hand to pay appellant's tuition in the Law Department of the university in either of the four adjacent states for the years 1935 and 1936.

Appellant contends that Missouri would not pay his full tuition in an adjacent state, but only the difference between the tuition charged by the University of Missouri and that charged by the adjacent states, as provided in the appropriation act of 1935. The proviso in the 1935 act which attempts to limit the authority of the board of curators to the payment of the difference between the tuition in Missouri and in the adjacent states is unconstitutional and void. A general statute (Section 9622 R. S. 1929) authorizes the board of curators of Lincoln University to pay the [fol. 223] reasonable tuition fees of negro residents of Missouri for attendance at the university of any adjacent state. This statute cannot be repealed or amended except by subsequent general legislation. Legislation of a general character cannot be included in an appropriation bill. To do so would violate section 28 of Article IV of the Constitution which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no question but what the mere appropriation of money and the amendment of section 9622, a general statute granting certain authority to the board of curators, are two different and separate subjects. *State ex rel. Davis, v. Smith*, 335 Mo. 1069, 75 S. W. (2d) 828; *State ex rel. Hueller v. Thompson*, 316 Mo. 272, 289 S. W. 338. The valid and invalid portions of the statute are separable. If we disregard the invalid proviso there is left a complete workable statute which appropriates the sum of \$10,000 for the purposes therein named. Had appellant applied for the benefits of this appropriation, it would have been the duty of the board of curators of Lincoln University to pay his full tuition in the Law Department of the university of an adjacent state. However, if the proviso in the appropriation act were valid, and Missouri paid only the difference between the fees charged by the University of Missouri and the charges exacted by the adjacent state, that fact would not render the opportunity offered appellant for a law education in an adjacent state unequal to that offered by the University

of Missouri, because if appellant attended the Missouri University he would be required to pay the full tuition charges himself, the same as white students are required to do.

For all of the reasons stated, we hold that the opportunity offered appellant for a law education in the university of an adjacent state is substantially equal to that offered to white students by the University of Missouri.

Appellant cites many cases in support of his contentions. Among the cases cited in *Peason v. Murray*, 169 Md. 478, 182 Atl. 590, 103 A. L. R. 706, upon which he places much reliance. The facts in that case are so radically different from the facts in the instant case that we do not regard [fol. 224] that case as an authority in support of the contentions made in this case. It was held in the *Pearson* case that the negro was entitled to be admitted to the Law Department of the University of Maryland because the State of Maryland had made no provision for establishing a law school for negroes, and the provisions made for the legal education of negroes outside of the state were inadequate. In so holding that court said:

"But in Maryland no officer or body of officers are authorized to establish a separate law school, there is no legislative declaration of a purpose to establish one, and the courts could not make the decision for the state and order its officers to establish one. Therefore, the erection of a separate school is not here an available alternative remedy."

In Missouri the situation is exactly opposite. Section 9618 R. S. 1929 authorizes and requires the board of curators of Lincoln University "to reorganize said institution so that it shall afford to the negro people of the state opportunity for training up to the standard furnished at the state university of Missouri whenever necessary and practicable in their opinion." This statute makes it the mandatory duty of the board of curators to establish a law school in Lincoln University whenever necessary or practical. *Lincoln University v. Hackman*, 295 Mo. 118, 124, 243 S. W. 320. The statute was enacted in 1921. Since its enactment no negro, not even appellant, has applied to Lincoln University for a law education. This fact demonstrates the wisdom of the legislature in leaving it to the judgment of the board of curators to determine when it would be necessary

or practicable to establish a law school for negroes at Lincoln University. Pending that time adequate provision is made for the legal education of negroes in the University of some adjacent state, as heretofore pointed out.

The State of Maryland not only did not provide for the establishment of a law school for negroes whenever necessary or practicable but it failed to make adequate provision for their legal education elsewhere. In 1935 the legislature of Maryland made provision for fifty scholarships of \$200 each to negroes, to enable them to attend colleges outside [fol. 225] the state, mainly to give the benefit of college, medical, law, and other professional courses to the colored youth of the state for whom no such facilities were available in the State of Maryland. This law became effective June 1, 1935. On June 18, when the Pearson case was tried below, "three hundred and eighty negroes had sought blanks for applying for the scholarships, and one hundred and thirteen applications had been filled in and returned." From this situation, it is apparent that many of the negro applicants would not get a scholarship. Whether or not the negro in the Pearson case would get one was altogether problematical. The Maryland court held that such a provision for the professional education of negro students outside the State of Maryland was wholly inadequate. In so holding that court said:

"That any one of the many individual applicants would receive one of the 50 or more scholarships was obviously far from assured. For a large percentage of them there was no provision. . . ."

"The Court is clear that this rather slender chance for any one applicant at an opportunity to attend an outside law school, at increased expense, falls short of providing for students of the colored race facilities substantially equal to those furnished to the whites in the law school maintained in Baltimore."

The Court advanced other reasons why the opportunities afforded negroes for a legal education outside the State of Maryland was not equal to the opportunity furnished the whites in the law school maintained in Baltimore, but no such reasons are present in the instant case, as will be shown by a comparison of the record in the two cases.

As we read the Maryland case, it holds that the negro there involved was entitled to be admitted to the law school

maintained for the whites in Baltimore for two reasons, (1) because the state had not authorized the establishment of a law school within the state for negroes, and there was no legislative declaration of a purpose to do so, and (2) because the provision made for the legal education of negro [fol. 226] students in schools outside the state was wholly inadequate and not substantially equal to the opportunity afforded the whites within the state.

The opposite situation obtains in Missouri. First, there is a legislative declaration of a purpose to establish a law school for negroes at Lincoln University whenever necessary or practical. Second, pending the establishment of such a school, adequate provision has been made for the legal education of negro students in recognized schools outside of this state. For these reasons the Maryland case is not in point here. Many other cases are cited by appellant, but in our judgment, they have no bearing on this case in view of our constitutional and statutory provisions separating the races for the purpose of education, and as we have pointed out, making provisions for higher education of the negro substantially equal to the provisions made for the whites.

Other points are advanced by appellant but they are all included in the questions we have discussed and determined.

For all of the reasons stated the judgment below should be affirmed. It is so ordered.

William F. Frank, Judge.

All concur.

[fol. 227] And thereafter, and on the 18th day of December 1937, the following proceedings were had and entered of record in said cause, to-wit:

No. 35286

STATE ex Rel. LLOYD L. GAINES, App.,

vs.

S. W. CANADA, etc. et al., Resps.

Comes now the appellant, by attorneys, and files herein his motion for a rehearing.

Which said motion for rehearing is in words and figures following to-wit:

[fol. 228] IN THE SUPREME COURT OF MISSOURI, EN BANC,
SEPTEMBER TERM, 1937

Nó. 35286

STATE OF MISSOURI at the Relation of LLOYD L. GAINES,
Appellant,

vs.

S.W. CANADA, Registrar of the University of Missouri, and
the Curators of the University of Missouri, a Body Corporate, Respondents

NOTICE OF FILING MOTION FOR REHEARING

To Fred L. Williams, Nick T. Cave, William S. Hogsett,
Attorneys for S. W. Canada, Registrar of the University
of Missouri, and the Curators of the University of
Missouri, a Body Corporate, Respondents: and to
Respondents.

You are hereby notified that the above named appellant
on the 18th day of December, 1937, filed in the above en-
titled cause, in the Supreme Court of Missouri, his motion
for re-hearing, copy of which motion is hereto attached.

(Signed) S. R. Redmond, Charles H. Houston, Henry
D. Espy, Attorneys for Appellant.

Service of the foregoing notice and receipt of a copy
thereof and attached motion is hereby acknowledged this
17th day of December, 1937.

(Signed) Fred L. Williams, Nick T. Cave, William
S. Hogsett, Ralph E. Murray, Attorneys for
Respondents.

[fol. 229] IN THE SUPREME COURT OF MISSOURI, EN BANC,
SEPTEMBER TERM, 1937

No. 35,286

STATE OF MISSOURI at the Relation of LLOYD L. GAINES,
Appellant,

vs.

S. W. CANADA, Registrar of the University of Missouri, and
the Curators of the University of Missouri, a Body Corporate, Respondents

APPELLANT'S MOTION FOR A REHEARING AND SUGGESTIONS IN
SUPPORT THEREOF

Now comes the appellant within ten (10) days after the filing of the opinion in the above entitled cause on December 9, 1937, and moves the Court to set aside the decision rendered therein and to grant appellant a rehearing thereof on the grounds that questions decisive of the case and fully submitted by counsel in brief and argument have been overlooked by the Court, that the decision violates the first section of the Fourteenth Amendment to the United States Constitution in that the State of Missouri by and thru the action of the Court has deprived him of his property without due process of law and has denied him the equal protection of the laws; the decision violates Section 30 of Article II of the Constitution of the State of Missouri, and is in conflict with controlling decisions of the United States Supreme Court, as hereinafter set forth and cited.

I-

The Court overlooked, failed to consider, and omitted from its opinion the following-mentioned material facts, shown in the Abstract at the pages indicated:

(1) That the Curators of the University of Missouri [fol. 230] admit foreign students to the University and its School of Law: white students from other states (Abs. 107), and foreign students—Hindu, Chinese, Japanese; that no geographical distinction is made as to where the student comes from; that in admitting students of every race except those of African descent, no question is raised about

whether they are going to locate in Missouri after they have received the benefit of instruction in the University of Missouri, or immediately return to their foreign homes (Abs. 120).

(2) That the tuition or fees charged by the University of Missouri for registration and study in the School of Law do not cover the expense of operating the School of Law, but must be supplemented by state appropriations (Abs. 124-125).

(3) That the Board of Curators of the University of Missouri, as trustee for the citizens and taxpayers of Missouri, hold valuable property allocated to use of the School of Law of the University of Missouri: such as law library of 35,000 volumes (Abs. 96).

(4) That the School of Law of the University of Missouri is a public institution which exists to serve the state and its bar (Abs. 96); that thru membership on the editorial board of the Missouri Law Review law students in the School of Law have unusual opportunities to gain experience in legal research in Missouri law (Abs. 75-76, 98, 103-105, 141-144), to which relator aspired (Abs. 75-76) and to which as a student of the School of Law of the University of Missouri he would have had a chance dependent on his scholarship record (Abs. 117).

(5) That white Missourians have their option of attending the state University of Missouri, or crossing the State line to a university closer to their homes than the University of Missouri (Abs. 90).

(6) That Lincoln University is only an undergraduate college (Abs. 138-139) and at no time material to this case has had any funds with which to expand beyond said undergraduate instruction, or to introduce any instruction in law. (Abs. 77, 131, 139, 149).

[fol. 231] (7) That the only appropriation to Lincoln University for expansion beyond an undergraduate college was an attempted appropriation of \$500,000 in 1921, which was declared void by this Court (Abs. 149-150).

(8) That the Board of Curators of Lincoln University never administered the scholarship funds appropriated by the state for payment of tuition and on account of tuition

of Negro students to foreign universities (Abs. 135, 167-168).

(9) That the letter to relator from President Florence of Lincoln University, September 23, 1935, definitely indicated to relator that there was no need of his applying for a legal education at Lincoln University by referring him exclusively to the State Superintendent of Schools (Abs. 72-73).

II

The decision herein deprived appellant of the equal protection of the laws as guaranteed him by the Fourteenth Amendment to the United States Constitution in holding that the scholarship provisions in section 9622, R. S. 1929, afford appellant the equal protection of the laws compared with the State of Missouri affording to white citizens of Missouri and all foreigners except persons of African descent a legal education in the University of Missouri.

III

The decision herein is in conflict with the ruling of the United States Supreme Court in *McCabe vs. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151, 160, in making the appellant's individual right to a legal education by and within the State of Missouri depend on the actions of others over whom he has no control.

Suggestions in Support of Motion for Rehearing

1. Under Head I, *Supra*, the Court completely overlooked the facts that (a) the University of Missouri at state expense and with public officers, offers to Missouri white [fol. 232] citizens, and all foreigners except persons of African descent, an education in law, which appellant a Negro citizen taxpayer helps to provide for said whites and foreigners, while it excludes him in spite of his qualifications solely on account of his race, and forces him into involuntary exile beyond the state border; (b) that the tuition or fees paid by the Missouri white students and foreigners enrolled in the School of Law do not cover even the operating expenses of the School of Law but must be supplemented by public tax money, which appellant is compelled to pay in part without an opportunity to participate in the benefits therefrom.

Pearson vs. Murray, 169 Md. 478, 182 A. 590, 103 ALR. 706 (1936). Such facts are indispensable to a determination of the question whether the State of Missouri has denied appellant equal protection of the laws and deprived him of his property without due process of law in violation of the Fourteenth Amendment to the United States Constitution and Section 30, Article II, of the Constitution of Missouri.

2. The Court adopted the wrong basis for comparing the scholarship provisions afforded Negroes under Section 9622, R. S. 1929, with the educational provisions offered white Missourians and foreigners in the School of Law of the University of Missouri. The Court in its opinion made the comparison on the basis of what the white and Negro students would have to pay. The Fourteenth Amendment to the United States Constitution and the Section 30, Article II, of the Constitution of Missouri do not measure appellant's rights on the basis of what white and Negro students have to pay when white students register in the state university and the Negro student is exiled beyond the state border. If any comparison is to be made, it must be on the basis of what the state does: how does the state treat the white and Negro students respectively. Thus if a Negro student barred from the University of Missouri is to receive equal treatment from the state even on a pecuniary basis, the state must give him the per capita contribution which the state makes to the legal education of a white student, figuring not only current [fol. 233] expenditure but capital investment as well—as for example the value of the library of the School of Law and other capital items. This point was clearly stressed in appellant's brief, pp. 48-49, and pressed on the Court in argument.

3. The Court in its opinion stresses the fact that appellant did not apply to Lincoln University for a legal education, whereas the record is clear that such an application would have been without effect. Lincoln University offered no legal instruction (Abs. 77) and President Florence's letter expressly directed appellant away from Lincoln University to the State Superintendent of Schools (Abs. 72-73). The law does not require a vain and useless thing. Further, if the Board of Curators of Lincoln University had desired

to offer legal instruction to petitioner-appellant, or any other student, they were without funds.

4. Under Head II, *supra*, the argument above under paragraph 2 is in point.

5. Petitioner's constitutional rights are individual, just as his obligations to the government, state and nation, are individual; and cannot be made to depend on how many or how few Negroes apply to the state for a legal education.

McCabe vs. Atchison, Topeka & Santa Fe Ry. Co.,
235 U. S. 151, 160.

In conclusion, appellant earnestly and respectfully asks the Court to consider each of the grounds herein presented, and set aside its decision rendered December 9th and grant him a rehearing in this cause.

Respectfully submitted, S. R. Redmond, Charles H.
Houston, Henry D. Espy, Attorneys for Appellant.

[fol. 234] And thereafter, and on the 20th day of December, 1937, the following further proceedings were had and entered of record in said cause, to-wit:

No. 35286

STATE ex Rel. LLOYD L. GAINES, App.

VS.

S. W. CANADA, etc., et al., Resp.

Comes now the appellant, by attorney, and files herein a motion to modify opinion.

Which said motion to modify opinion is in words and figures following, to-wit:

[fol. 235] IN THE SUPREME COURT OF MISSOURI, EN BANC,
SEPTEMBER TERM, 1937

No. 35,286

STATE OF MISSOURI at the Relation of LLOYD L. GAINES,
Appellant,

vs.

S. W. CANADA, Registrar of the University of Missouri, and
the Curators of the University of Missouri, a Body Corporate, Respondents

NOTICE OF FILING MOTION TO MODIFY OPINION

To Fred L. Williams, Nick T. Cave, William S. Hogsett, and
Ralph E. Murray, Attorneys for S. W. Canada, Registrar
of the University of Missouri, and the Curators of the
University of Missouri, a Body Corporate, Respondents,
and to Respondents:

You are hereby notified that the above named appellant
will on the 20th day of December, 1937, file in the above
entitled cause, in the Supreme Court of Missouri, his motion
to modify the opinion, a copy of which Motion is hereto
attached.

S. R. Redmond, Charles H. Houston, Henry D. Espy,
Attorneys for Appellant.

Service of the foregoing notice and receipt of a copy
thereof and attached motion is hereby acknowledged this —
day of December, 1937.

_____, _____, Attorneys for Respondents.

[fol. 236] IN THE SUPREME COURT OF MISSOURI, EN BANC,
SEPTEMBER TERM, 1937

No. 35,286

STATE OF MISSOURI at the Relation of LLOYD L. GAINES,
Appellant,

vs.

S. W. CANADA; Registrar of the University of Missouri, and
the Curators of the University of Missouri, a Body Corporate, Respondents

MOTION TO MODIFY OPINION

Now comes the appellant within ten (10) days after the filing of the opinion in the above entitled cause on December 9, 1937, and moves the Court to modify its opinion rendered herein on said December 9, 1937, and for grounds of said motion states the following:

I

The Court in its opinion in discussing the question "whether or not the advantages for higher education offered to the Negroes of the state are substantially equal to the advantages furnished white students" in order to determine the further question whether appellant has been deprived by the state of Missouri "of his proprietary rights or any other right guaranteed to him by the State or Federal Constitution", wholly failed to mention or consider the following facts of record which appellant submits are decisive of the questions posed:

(1) That the Curators of the University of Missouri admit foreign students to the University and its School of Law; white students from other states and countries, [fol. 236] Hindus, Chinese, Japanese, and students of every race except those of African descent, who are barred regardless whether they are citizens of the state of Missouri or not; that in admitting foreign students no geographical distinctions are inquired into and no question raised as to how far such student has to come to reach the University of Missouri; that no question is raised with the foreign student before admitting him as to whether he intends to locate in Missouri after being educated in the University of Mis-

souri or whether they intend immediately to return to their foreign homes (Abs. 107, 120).

(2) That the tuition or fees charged by the University of Missouri for registration and study in the School of Law do not cover the expense of operating the School of Law, but must be supplemented by state appropriations (Abs. 124-125).

(3) That the Board of Curators of the University of Missouri, as a public trustee for the citizens and taxpayers of Missouri, hold valuable property allocated to the use of the School of Law of the University of Missouri, and the legal education of the students of said School: for example, a law library of 35,000 volumes (Abs. 96).

(4) That the School of Law of the University of Missouri is a public institution which by official declaration exists to serve the state and its bar (Abs. 96); that for a lawyer practising in Missouri training at the School of Law of the University of Missouri offers certain advantages over training in other law schools (Abs. 127-128) in that, among other things, a higher percentage of University of Missouri law graduates pass the state bar examinations than the percentage of graduates from other schools (Abs. 145-146); that thru membership on the editorial board of the Missouri Law Review law students in the School of Law have unusual opportunities to gain experience in legal research in Missouri law (Abs. 75-76, 98, 103-105, 141-144), to which reporter aspires (Abs. 75-76) and to which as a student of the School of Law of the University of Missouri he would have [fol. 238] a chance dependent on his scholarship record (Abs. 117).

(5) That appellant desires to practise law in the State of Missouri (Abs. 76).

(6) That the School of Law of the University of Missouri is the only publicly supported law school in the State of Missouri (Abs. 120).

(7) That Lincoln University is only an undergraduate college (Abs. 129, 138-139) and has never had funds with which to offer instruction in law (Abs. 77, 131, 139, 149-150), and does not offer any instruction in law (Abs. 77), and has no definite plans for introducing instruction in law (Abs. 130, 136).

(8) That the Board of Curators of Lincoln University never administered the scholarship funds appropriated by the State for the payment of tuition and on account of tuition differentials for Negro students to study in foreign universities subjects offered to white students in the University of Missouri (Abs. 135, 167-168).

(9) That the letter to appellant from President Florence of Lincoln University, September 23, 1935, definitely indicated to appellant that there was no need of his applying for legal education at Lincoln University by referring him exclusively to the State Superintendent of Schools (Abs. 72-73).

The matters above were all stressed in brief and/or argument before the Court, and must be considered in an effort to determine whether the State of Missouri has denied appellant the equal protection of the laws and deprived him of his property without due process of law as guaranteed for his protection in the Fourteenth Amendment to the Constitution of the United States and Section 30 of Article II of the Constitution of the State of Missouri. Unless the Court considers the above facts, appellant will be disadvantaged and under an unfair burden in seeking review of his case by the Supreme Court of the United States.

II

The Court failed to consider and give the appellant the benefit of the law imposing the burden of proof to establish [fol. 239] that the State has afforded appellant a substantial equivalent to a legal education in the University of Missouri School of Law, from which the Board of Curators has barred him solely on account of color, clearly on respondents.

Pearson vs. Murray, 169 Md. 478, 182 A. 590, 103 ALR 706 (1936).

See further Head I-D, pp. 52-53, Appellant's Brief and cases there cited.

The decision of the Court as now stated forces appellant not only to prove discrimination by exclusion from the University of Missouri in spite of his legitimate qualifications for admission to the School of Law thereof, but further makes him go forward and prove the issue that the State has not afforded him a substantial equivalent.

III

The opinion of the Court in discussing the question how far appellant would have to travel from his home in St. Louis to the universities of other states as compared with the distances which some Missouri white students would have to travel to reach Columbia, Missouri, where the University of Missouri is located, wholly overlooked the fact that the white students are not compelled to travel to the University of Missouri, but have their option to cross the state line and attend a state university nearer to their residence.

IV

The opinion of the Court did not consider the fact that the legal and constitutional rights of appellant to a legal education at the hands of the State of Missouri do not depend on the action or inaction of other Negroes, but are individual to him alone.

McCabe vs. Atchison, etc. Ry. Co., 235 U. S. 151, 160.

Wherefore the premises considered appellant prays that the opinion of the Court be modified by considering and discussing the points set forth above, and for such other relief in reference to the opinion as to the Court may seem meet and proper.

S. R. Redmond, H. D. Espy and C. H. Houston, Attorneys for Appellant.

[fol. 240] And thereafter, and on the 27th day of December 1937, the following further proceedings were had and entered of record in said cause, to-wit:

No. 35286

STATE ex Rel. LLOYD L. GAINES, App.,

VS.

S. W. CANADA, etc. et al., Resps.

Come now the respondents, by attorneys, and file suggestions in opposition to appellant's motion for a rehearing and motion to modify opinion.

Which said Suggestion in Opposition are in words and figures following, to-wit:

[fol. 241] IN THE SUPREME COURT OF MISSOURI, EN BANC,
SEPTEMBER TERM, 1937

No. 35286

STATE ex Rel. LLOYD L. GAINES, Appellant,

vs.

S. W. CANADA, Registrar of the University of Missouri, and
the Curators of the University of Missouri, a Body Corporate, Respondents

SUGGESTIONS IN OPPOSITION TO APPELLANT'S MOTION FOR
REHEARING AND MOTION TO MODIFY

Appellant's motions for rehearing and to modify are largely based upon the same grounds.

The motion for rehearing first complains that the court has omitted from its opinion certain alleged facts. The obvious answer is that none of the alleged facts is material to the questions presented for decision. The court's opinion has fully and fairly stated all of the facts necessary to a decision of appellant's assignments of error. This is all that is required.

Appellant next contends that the decision deprives him of the equal protection of the laws. That of course is the principal question decided. The opinion has disposed of that question upon grounds which are impregnable to attack; and there is nothing that we care to add.

Appellant contends that the decision is in conflict with *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*, 235 U. S. 151, holding that the constitutional right to equal protection of the laws is a personal one, not dependent upon the number of persons affected. That appellant's contention [fol. 242] is unsound is perfectly apparent from the opinion herein, which clearly holds that appellant as an individual citizen is constitutionally entitled to an opportunity for legal education substantially equal to that offered to white students.

This covers the three contentions advanced in the motion for rehearing. Plainly they are without merit, and that motion should be denied.

Appellant's motion to modify the opinion is substantially a restatement of the same contentions presented in the

motion for rehearing, except his contention as to the burden of proof. As a matter of fact the opinion does not place on appellant the burden of proof—indeed, the opinion does not discuss the burden of proof at all. However, the opinion does fully state the essential facts, which facts (proven by evidence offered by appellant himself) show that appellant was accorded an opportunity for legal education substantially equivalent to that offered to white students in the University of Missouri School of Law. This renders immaterial any discussion as to the burden of proof.

We respectfully submit that appellant's motion for rehearing and motion to modify should each be denied.

Fred L. Williams, Nick T. Cave, Ralph E. Murray,
William S. Hogsett, Attorneys for Respondents.

No. 35286

STATE ex Rel. LLOYD L. GAINES, App.,

vs.

S. W. CANADA, etc., et al., Resps.

Now at this day, the Court having seen and fully considered appellant's motion for a rehearing and motion to modify opinion, doth order that both of said motions be, and they are hereby overruled.

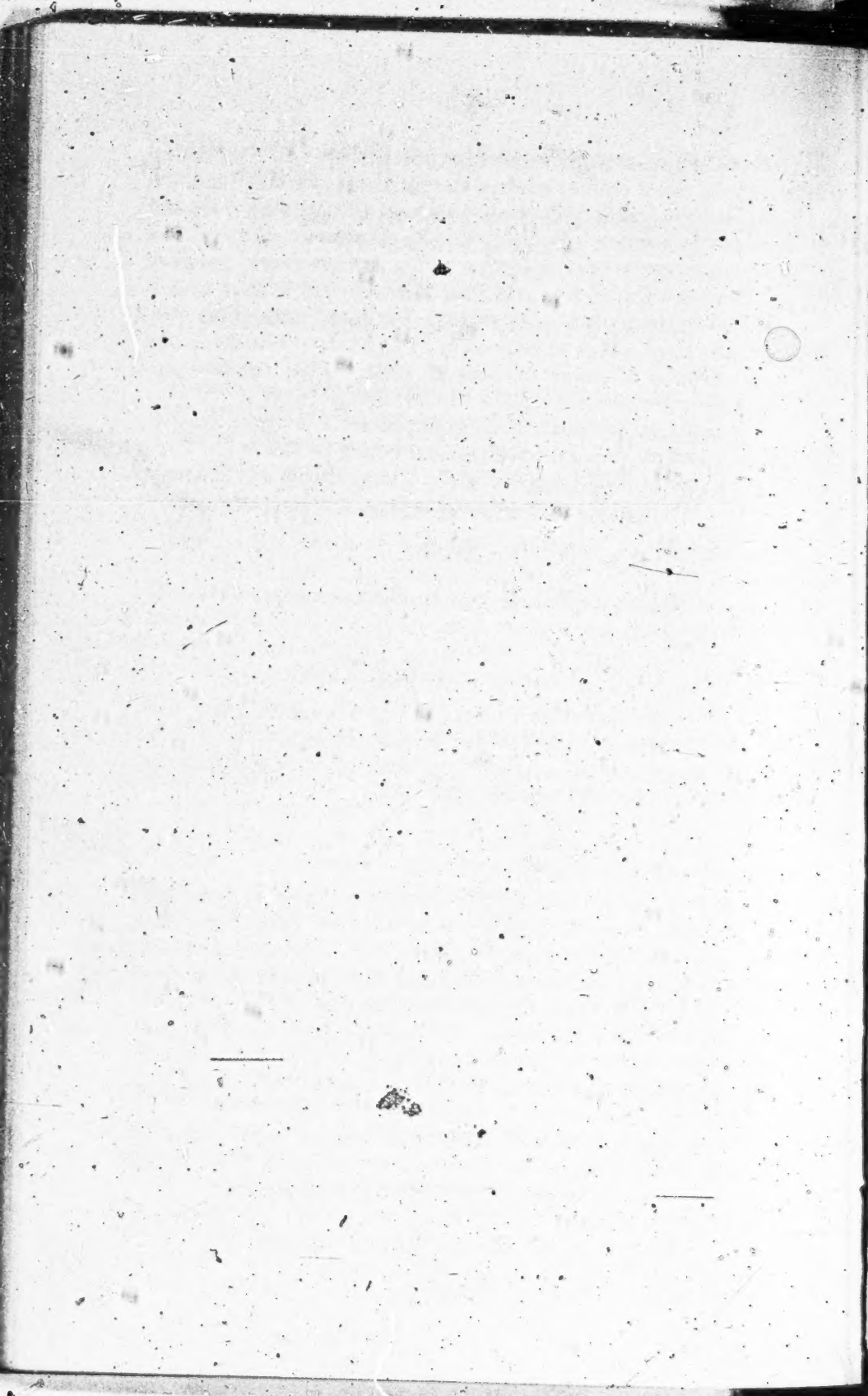
[fol. 243] STATE OF MISSOURI, set:

I, E. F. Elliott, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in a cause entitled State of Missouri, at the relation of Lloyd L. Gaines, appellant, against S. W. Canada, Registrar of the University of Missouri, and the Curators of the University of Missouri, a body corporate, respondents, No. 35286, as fully as the same appears of record and on file in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Jefferson, State aforesaid, this 12th day of May 1938.

E. F. Elliott, Clerk, Supreme Court of Missouri.
(Seal of the Supreme Court of Missouri.)

(5709)



[fol. 239] And thereafter and on the 25th day of February 1938, the following further proceedings were had and entered of record in said cause, to-wit:

35286

STATE ex Rel. LLOYD L. GAINES, App.,

vs.

S. W. CANADA, etc., et al., Resps.

Now at this day, the court having seen and fully considered appellant's motion for a rehearing and motion to modify opinion, doth order that both of said motions be, and they are hereby overruled.

STATE OF MISSOURI, set:

I, E. F. Elliott, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the above is a true and correct copy of the order of this court overruling appellant's motion for a rehearing and motion to modify opinion, as fully as the same remains on record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court. Done at my office in the City of Jefferson this 14th day of May 1938.

E. F. Elliott, Clerk, Supreme Court. (Seal of the Supreme Court of Missouri.)

[fol. 240] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U.

FILED

MAY 24 1938

CHARLES ELMORE GROPE
CLERK

Supreme Court of the United States

OCTOBER TERM, 1937

No. [REDACTED]

57

STATE OF MISSOURI, ex rel. LLOYD L. GAINES,
Petitioner,

vs.

S. W. CANADA, Registrar of the University of Missouri, and
the CURATORS OF THE UNIVERSITY OF MISSOURI,
a Body Corporate.

PETITION FOR CERTIORARI

LLOYD L. GAINES, *Petitioner,*
by CHARLES H. HOUSTON,
SIDNEY R. REDMOND,
HENRY D. ESPY,
Attorneys.

Of Counsel:

LEON A. RANSOM,
THURGOOD MARSHALL,
EDWARD P. LOVETT.

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Supreme Court of the United States

OCTOBER TERM, 1937

No. _____

STATE OF MISSOURI, ex rel. LLOYD L. GAINES,
Petitioner,

vs.

S. W. CANADA, Registrar of the University of Missouri, and
the CURATORS OF THE UNIVERSITY OF MISSOURI,
a Body Corporate.

PETITION FOR CERTIORARI

To the Supreme Court of the United States:

Your Petitioner, Lloyd L. Gaines, respectfully alleges:

A.

Summary Statement of the Matter Involved

Petitioner, a citizen and taxpayer of Missouri, resident of St. Louis, twenty-five years of age, who desires to study law to prepare himself to practice in Missouri and for public service in said State, applied for admission to the first year class of the School of Law of the State University of Missouri, and was rejected by the Registrar and the Curators of the University solely because he is a Negro. His qualifications, apart from race, are admitted.

The School of Law of the University of Missouri is the only public institution in Missouri offering instruction in law, and the only institution in Missouri offering instruction in law which petitioner is eligible to attend. Petitioner applied to the Circuit Court of Boone County, Missouri, which had jurisdiction in the premises, for a writ of mandamus against the Registrar and Curators of the University to compel them to admit him to the first year class of the School of Law on the same terms and conditions as other students; but the writ was denied. On appeal, the judgment was affirmed December 9, 1937, by the Supreme Court of Missouri, the highest court in the State. Motions for rehearing and for modification of opinion duly filed were overruled February 25, 1938.

The "Curators of the University of Missouri," the administrative agency of the State which governs the University, justified its refusal to admit petitioner to the School of Law on the grounds that it is against the Constitution, laws and public policy of the State to admit a Negro to the University of Missouri, and that by the Lincoln University Act of 1921 (Laws 1921, p. 86)¹ the State has provided Negroes an opportunity to study law equivalent to that which the State offers to white and other students in the University of Missouri.

The Lincoln University Act of 1921 changed the name of Lincoln Institute, the State undergraduate college for Negroes, to Lincoln University and required the Curators of Lincoln University "whenever necessary and practicable in their opinion" to reorganize the institution so that it might afford Negro citizens of the State opportunity for training up to the standard furnished at the University of Missouri; and pending the full development of Lincoln University its Curators were to pay the tuition of Missouri Negroes at the university of any adjacent State to take any course offered at the University of Missouri but not at Lincoln University. To carry out the purposes of the Act,

¹ See Appendix, p. 25.

by section 8 an attempt was made to appropriate \$500,000 from the general school fund of the State. This appropriation was declared void by the Missouri Supreme Court in *Lincoln University v. Hackmann*, 295 Mo. 118 (1922), and no appropriation has since been made to expand Lincoln University from an undergraduate college to a university offering professional or graduate courses. Lincoln University offers no professional or graduate work. No definite program for expansion has been evolved.

The University of Missouri accepts as students not only white Missourians, but also nonresident whites, Asiatics and other foreigners. The only qualified students refused admission to the University are Negroes, because of their race or color.

No express constitutional or legislative provision requires the separation of the races for purposes of professional or graduate training, and petitioner brought and prosecuted his cause in the Circuit Court and the State Supreme Court on the theory that Section 9657,² Missouri Revised Statutes, 1929, specifically authorized the admission of all qualified citizens of Missouri to the State University. The Missouri Supreme Court however ruled that the constitution, laws and public policy of the state excluded Negroes from the University of Missouri and that the State had otherwise accorded petitioner an opportunity to study law substantially equal to the opportunity accorded white and other students in the School of Law of the University of Missouri.

The case is brought before this Court for review on petitioner's claim that the provisions made by the State for its Negro citizens are not an equivalent for excluding them from the University of Missouri solely because of race or color, and that the State has denied him the equal protection of the laws guaranteed him by the Fourteenth Amendment to the United States Constitution.

² See Appendix, p. 24.

B.

Reasons Relied on for the Allowance of the Writ.

1. The State of Missouri denied petitioner the equal protection of the laws guaranteed him by the Fourteenth Amendment to the Constitution of the United States in that—

a. The Curators of the University of Missouri refused him admission to the School of Law of the University of Missouri (the only public institution offering instruction in law in Missouri) solely because of race or color.

Petitioner challenged his exclusion as a denial of his Federal right to equal protection both in the Circuit Court and the Supreme Court of Missouri. The Circuit Court denied mandamus without opinion; the Supreme Court considered and denied the claim of Federal right.

b. The Lincoln University Act of 1921 as applied to the facts of this case does not afford petitioner a substantial equivalent to the opportunity offered to white and other non-Negro students to study law in the School of Law of the University of Missouri.

Petitioner challenged the Lincoln University Act as a denial of his Federal right to equal protection both in the Circuit Court and the Supreme Court of Missouri. The Circuit Court denied mandamus without opinion; the Supreme Court considered and denied the claim of Federal right.

c. The burden of proving that the State had otherwise afforded petitioner an opportunity to study law substantially equal to that accorded by the State to white and other non-Negro students in the School of Law of the University

of Missouri was on the Registrar and Curators of the University of Missouri. They failed to sustain the burden.

Petitioner asserted both in the Circuit Court and the Supreme Court of Missouri that it was an incident to his Federal right to the equal protection of the laws that when he had established that the State had excluded him from the School of Law of the University of Missouri solely because of race or color, the burden was on the representatives of the State to establish that the State had otherwise accorded him an opportunity to study law substantially equal to that accorded white and other non-Negro students in the School of Law of the University of Missouri. Neither the Circuit Court nor the Supreme Court expressly ruled on this claim of Federal right.

2. There is a conflict of decision between the highest courts of the two states which have passed on the question as to what constitutes equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States where the state has excluded a qualified Negro citizen of the state from the School of Law of the State University solely because of race or color.

The Court of Appeals of Maryland in *Pearson v. Murray*, 169 Md. 478, 182 A. 590, 103 A. L. R. 706 (1936), decided it was a denial of the Federal right to exclude the Negro student. The Supreme Court of Missouri in the instant case, 113 S. W. (2d) 783 (Mo. 1937), decided it was not a denial of Federal right to exclude the Negro student. There is no precedent in this court authoritatively settling the Federal question.

3. Sixteen states exclude Negroes from their State Universities solely because of race or color. Six of these sixteen states, and Maryland, have scholarship provisions for

study outside the state.* Ten make no provisions whatever for the graduate or professional training of Negroes.

Even if it be considered that under any circumstances a money grant could constitute the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States to a Negro citizen forced by the state to go outside the state solely because of race or color to study courses offered to all other students in the state university within the state border, nevertheless there is an irreconcilable conflict in the statutes of the scholarship laws as to size of grant, elements of compensation and other conditions which leaves the question in confusion and great uncertainty. There is no Federal precedent establishing whether a scholarship grant can constitute the equal protection of the laws; and if so, what the standard of equal protection should be.

4. According to the 1930 Census 9,176,970 Negroes live in the sixteen states which exclude Negroes from the state university solely because of race or color. Negroes attending school in these states numbered 1,879,388. In 1933, these states had 17,893 Negroes enrolled in institutions of higher learning.⁴ It is of the utmost public importance that a standard of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States be established for these students as they attempt to equip themselves to meet the highest standards of citizenship.

A decision in this case will go far toward establishing a standard of conduct for the States under the equal protection clause of the Fourteenth Amendment.

*The states which exclude Negroes from their state universities solely because of race or color are Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia. Kentucky, Missouri, Oklahoma, Tennessee, Virginia and West Virginia have scholarship laws, making diverse provisions in aid of Negroes studying in universities outside the state. Maryland also has a scholarship law. The respective laws are set out in the Appendix to the Brief, pp. 25-37. The other ten states make no provision whatsoever for Negroes to take graduate or professional courses open to white students in the state university.

⁴Statistics are listed in the Appendix, pp. 38-39.

In support of the foregoing grounds of application your petitioner submits the accompanying brief setting forth in detail the precise facts and arguments applicable thereto.

Wherefore your petitioner prays that this Court, pursuant to United States Judicial Code, Section 237b, as amended by Act of February 13, 1925, 43 Stat. 973, issue a writ of certiorari to review the judgment of the Supreme Court of Missouri affirming the judgment of the Circuit Court of Boone County denying his application for a writ of mandamus as aforesaid.

All of which is herewith respectfully submitted this 24th day of May, 1938.

LLOYD L. GAINES, *Petitioner,*
by CHARLES H. HOUSTON,
SIDNEY R. REDMOND,
HENRY D. ESPY,
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LEON A. RANSOM,
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EDWARD P. LOVETT.



Supreme Court of the United States

OCTOBER TERM, 1937

No. _____

STATE OF MISSOURI ex rel. LLOYD L. GAINES,

Petitioner,

vs.

S. W. CANADA, Registrar of the University of Missouri, and
the CURATORS OF THE UNIVERSITY OF MISSOURI,
a Body Corporate.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion has not yet been officially reported. It appears in 113 S. W. (2d) 783 and at pages 210-224 of the record. An application for rehearing and modification of opinion was denied without opinion (R. 238).

II

Jurisdiction

1

The statutory provision is Judicial Code, section 237b as amended by Act of February 13, 1925, 43 Stat. 937 (U. S. C. tit. 28, section 344b).

The date of the judgment is December 9, 1937, on which date the Missouri Supreme Court affirmed (R. 209). Motions for rehearing (R. 244) and for modification of opinion (R. 230) were duly filed, and denied February 25, 1938 (R. 238).

That the nature of the case and the rulings below bring the case within the jurisdictional provisions of section 237b, *supra*, appears from the following:

The claim of federal constitutional rights was specifically set up in the petition for writ of mandamus (R. 10-11) and renewed at every stage of the case (R. 41, 44, 46, 203, 206, 226, 234). The trial court rendered judgment without opinion against the rights claimed (R. b). On appeal the Supreme Court of Missouri in its opinion specifically passed upon the federal rights claimed (R. 210-224).

The federal right claimed is that in excluding him from the School of Law of the University of Missouri solely because of his race or color, under the circumstances present in this case, the State of Missouri has denied petitioner the equal protection of the laws guaranteed him by the Fourteenth Amendment to the Constitution of the United States (R. 10-11, 41, 46, 216). Incidental to this claim are the further contentions that on the facts the state through the Lincoln University Act of 1921 has not accorded petitioner an opportunity to study law substantially equal to the opportunity accorded by the State to white and other non-Negro students in the School of Law of the University of Missouri (R. 46); that the burden of proving the state had otherwise accorded petitioner an opportunity to study law substantially equal to the opportunity accorded white and other non-Negro students in the School of Law of the University of Missouri was on the Registrar and Curators of the University of Missouri, and they failed to sustain

the burden (R. 205); and that the Supreme Court of Missouri erred in holding that the test of equal protection is whether the Negro student forced to study law outside the state has to pay as much or more money as the white law student in the University of Missouri (R. 229).

4

The following cases among others sustain the jurisdiction:

No decision of this Court directly in point has been found but the language of this Court in *Gong Lum v. Rice*, 275 U. S. 78, 84 (1927), states that the question of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States is open for consideration by this Court where an express claim is made that petitioner has been excluded from the only public educational institution available solely because of race or color (R. 3).

In *Pearson v. Murray*, 169 Md. 478, 182 A. 590, 103 A. L. R. 706 (1936), the only other case known on the questions here involved, the Court of Appeals of Maryland held it did constitute a denial of equal protection for the State to exclude a Negro from the only public law school in the State (the School of Law of the University of Maryland) solely because of race or color.

Beidler v. Tax Commission, 282 U. S. 1, 8 (1930), *Fiske v. Kansas*, 274 U. S. 380, 385-6 (1927), and *Creswill v. Knights of Pythias*, 225 U. S. 246, 261 (1912), decide that where a federal right has been ascertained and denied, it is the province of this Court to ascertain whether the conclusion of the State court has adequate support in the evidence. *Ancient Egyptian Order v. Michaux*, 279 U. S. 737, 745 (1929), decides that it is the prerogative of this Court to inquire not only whether the federal right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support.

III

Statement of the Case

Petitioner, a citizen and taxpayer of Missouri, resident of St. Louis, twenty-five years of age, has been denied admission to the School of Law of the University of Missouri solely because he is a Negro (R. 24). The School of Law of the University of Missouri is the only public institution in Missouri offering instruction in law, and the only institution in the State offering instruction in law which petitioner is eligible to attend (R. 3, 120). Petitioner desires to prepare himself for the practice of law in Missouri and for public service in said State (R. 2, 75). His qualifications, apart from race, for admission to the School of Law are admitted (R. 210).

The Lincoln University Act

For its Negro citizens the legislature of Missouri in 1921 passed the Lincoln University Act (Laws 1921, p. 86) which changed the name of Lincoln Institute, the State undergraduate college for Negroes, to Lincoln University. It required the curators (sec. 3) to reorganize the institution whenever necessary and practicable in their opinion so that Lincoln University might accord Negro citizens opportunity for training up to the standard furnished at the University of Missouri. Pending the full development of Lincoln University the Curators (sec. 7) were charged with paying the tuition of Negro students in the universities of the adjacent states to take courses offered at the University of Missouri but not at Lincoln University. Section 8 attempted to appropriate \$500,000 from the general school fund for purposes of the Act, but this appropriation was declared void by the Missouri Supreme Court in *Lincoln University v. Hackmann*, 295 Mo. 118 (1922). Lincoln University never got any benefit from said appropriation (R. 149).

The legislature of Missouri has appropriated substantially all sums requested by the Curators of Lincoln University for maintenance and general funds (R. 137) but nothing for expansion. Lincoln University has never offered instruction in law, or other professional or graduate training. It remains an undergraduate college (R. 129), and no definite program of expansion has been evolved (R. 130, 140). When this cause was tried, Lincoln University was facing the prospect of ending up the biennium with a small deficit (R. 135).

Prior to the decision of the Supreme Court of Missouri in this case the scholarships authorized in section 7 of the Act were not administered by the Curators of Lincoln University but by the State Superintendent of Schools (R. 163-169). No money was appropriated for scholarships until 1929. (Missouri Laws 1929, p. 61). By the appropriation act of 1933 the scholarships were reduced from full tuition to the differential between the tuition at the out-of-state university and at the University of Missouri (Missouri Laws 1933, p. 87). During all times material to this case the State Superintendent in administering the scholarships was awarding Negro students only the differential in tuition (R. 168). The Missouri Supreme Court in the instant cause ruled that under the Lincoln University Act of 1921 Negro students were entitled to full tuition payment, but it went further and declared that a scholarship based on tuition differential would not violate the equal protection of the laws (R. 221).

Facilities Open to Petitioner

The Registrar and Curators of the University of Missouri mainly relied on the tuition scholarship as according petitioner the equal protection of the laws (R. 72, 83). No serious argument was made at the trial that Lincoln University either could or would inaugurate a law course for the benefit of petitioner, the only applicant. When the President of Lincoln University and the President of its

Board of Curators, conferred about petitioner's application to the University of Missouri, they referred him to the scholarship provisions (R. 72-73). Counsel for the respondents directed his most serious cross-examination of petitioner to petitioner's refusal of the scholarship provisions (R. 83). The trial court excluded cross-examination about petitioner's attitude toward attending a law school at Lincoln University—if there were such a school—on the objection such question was purely speculative (R. 89). No money existed to open a law school at Lincoln University; all appropriations available to Lincoln University were hypothecated to run the undergraduate college (R. 131). The President of the Board of Curators of the University of Missouri admitted a law school could not be created in a day (R. 184). Only one Negro law student could be found in all the adjacent state universities (R. 140). Only three Negro lawyers had been admitted to the bar of Missouri in the past five years (R. 126).

Comparison Between Law Courses in University of Missouri and Universities of Adjacent States

Petitioner gave as one of his reasons for desiring to attend the School of Law of the University of Missouri that the School specialized in Missouri law (R. 75-76). The Dean of the School of Law denied this (R. 109). The catalogue of the University however announced that the School recognized a duty to the State beyond the equipment and training of practitioners (R. 94); that it attempted to serve the state bar by publishing the Missouri Law Review, every number of which contains notes on Missouri cases (R. 93). A list of articles and case comments from the Missouri Law Review showing the concentration on Missouri law appears in the record (R. 141-144). Ranking students in the second and third year classes have the opportunity to serve as editors on the Law Review, and do this extra work in Missouri law (R. 117).

Respondents showed that the casebooks used in the School of Law of the University of Missouri, Illinois, Nebraska, Kansas, and Iowa are largely the same (R. 109), but the Dean of the School of Law of the University of Missouri admitted that naming a casebook would not determine whether in fact an instructor paid special attention to Missouri law in his particular course (R. 114-115).

In 1935 only 24 out of 200 students in the School of Law were not Missourians. A majority of the graduates of the School of Law settle in Missouri (R. 99). A higher percentage of graduates of the School of Law of the University of Missouri pass the Missouri bar examination than graduates of other law schools (R. 145-146). One lawyer witness trained in a general law school outside Missouri testified he found himself at a disadvantage coming to the bar in Missouri in competition with lawyers trained in the University of Missouri (R. 127-128); and his testimony stands uncontradicted.

Petitioner desires to practice in Missouri, but if he enrolled in the law school of the University of Kansas he would find himself in a law school where especial emphasis is placed on the study of Kansas court decisions, statutes and methods of practice (R. 194). The University of Iowa pays special attention to the needs of students who intend to practice in Iowa (R. 194) and the Iowa Law Review gives particular attention to problems of interest to the Iowa bar (R. 195). University of Nebraska law graduates are admitted to the Nebraska bar on motion (R. 195).

Yet the Missouri Supreme Court held that petitioner could get as "sound, comprehensive and valuable legal education in the law schools of Kansas, Nebraska, Iowa and Illinois as in the University of Missouri" (R. 219) for petitioner's purposes as a future practitioner of Missouri law.

Equivalence of Scholarship

Respondents introduced proof showing the respective distances between St. Louis and Columbia, Missouri (the

seat of the University of Missouri), and St. Louis and the seats of the adjacent state universities, and corresponding railway fares (R. 152); likewise as to tuition fees (R. 157-162). No evidence whatever was introduced as to relative living costs. The Missouri Supreme Court dismissed the question of relative living costs with a statement that if petitioner went to the University of Missouri he would have living costs as well as if he went to school outside the state (R. 220). The Supreme Court did not make the test of equivalence whether the state was contributing as much to the legal education of petitioner as to the legal education of whites and other non-Negro students in the University of Missouri, but whether the cost to petitioner to attend an out-of-state university would be as great as the cost to a white student to attend the School of Law of the University of Missouri (R. 220-222).

No Attempt to Control Discretion

Petitioner made no attempt to dictate or prescribe the hours, classes, or other incidentals of instruction to be accorded him in the School of Law of the University of Missouri.

Judicial Proceedings.

The Circuit Court denied petitioner a peremptory writ of mandamus and dismissed his petition without opinion (R. b). The Missouri Supreme Court affirmed (R. 209), expressly holding that the State had accorded petitioner the equal protection of the laws (R. 224).

IV

Errors Below Relied Upon Here; Summary of Argument

The points petitioner urges on this court are in summary form as follows:

1. The State of Missouri denied petitioner the equal protection of the laws in excluding him from the School of Law of the University of Missouri solely because he is a Negro.

2. The facilities afforded petitioner under the Lincoln University Act of 1921 to study law are not substantially equal to the facilities afforded white and other non-Negro students by the State in the School of Law of the University of Missouri.

3. The Registrar and Curators of the University of Missouri failed to establish that the State had afforded petitioner the equal protection of the laws in the face of excluding him from the School of Law of the University of Missouri solely because of his race or color.

4. Mandamus against the Registrar and the Curators of the University of Missouri was the proper remedy for the protection of petitioner's constitutional rights.

POINT I

The State of Missouri Denied Petitioner the Equal Protection of the Laws in Excluding Him From the School of Law of the University of Missouri Solely Because He Is a Negro.

The exclusion of a Negro from the enjoyment of the only public facility in the State available for his needs solely on account of race or color constitutes a *prima facie* case of a denial of the equal protection of the laws.

Pearson v. Murray, 169 Md. 478, 182 A. 590, 103 A. L. R. 706 (1936): exclusion from the School of Law of the State University.

The question left open in Gong Lum v. Rice, 275 U. S. 78, 84 (1927), is raised in this case: the exclusion of a quali-

fied student on account of race or color from the only public institution in the State available to the student.

It is submitted that the crux of this case is whether in spite of his exclusion from the School of Law of the University of Missouri the State has otherwise accorded petitioner a substantially equal opportunity for the study of law as befits his needs as a future practitioner in Missouri. As will be shown later, the State has not.

POINT II

The Facilities Afforded Petitioner Under the Lincoln University Act of 1921 to Study Law Are Not Substantially Equal to the Facilities Afforded White and Other Non-Negro Students by the State in the School of Law of the University of Missouri.

The value to a citizen of an education in his own state university includes not only classroom value but diploma value. Petitioner is not only entitled to the benefit of the instruction and research in Missouri law available to him in the School of Law of the University of Missouri (R. 95-108) but also to the prestige and reputation of the School of Law among the citizens of the State, some of whom will be his future clients (R. 145-146).

See 45 Yale Law Journ. 1296, 1299; annotation (1936).

Board of Ed. v. Board of Ed., 264 Ky. 245, 94 S. W. (2d) 687 (1936).

The finding of the Missouri Supreme Court that a law student desiring to practice law in Missouri can get just as good a legal education for his purposes in the law schools of the Universities of Kansas, Nebraska, Iowa or Illinois, as in the University of Missouri, based on the fact that the same casebooks are commonly used in the law schools and students transfer from one school to the other without loss of credits (R. 219) is conclusively rebutted by the other

facts in the record showing specialization in local state law by the several schools (Statement of Case, *supra*).

The Lincoln University Act of 1931 (see Appendix) theoretically offers two possibilities: that the Curators of Lincoln University establish a law school, or give petitioner a tuition scholarship outside the State. Actually, the only choice open to petitioner is the tuition scholarship. The letter from President Florence of Lincoln University to Gaines, September 23, 1935 (R. 72-73) and the testimony of Dr. J. D. Elliff, President of the Board of Curators of Lincoln University (R. 128-141) conclusively disposes of any argument that the Curators might have set up a law school for Gaines at Lincoln University.

The alternatives presented to petitioner were either to try to enroll in the School of Law of the University of Missouri or accept a tuition scholarship in the law school of an adjacent state university: Kansas, Nebraska, Iowa or Illinois. It has been seriously questioned whether as a matter of constitutional principle any scholarship forced on a Negro for out-of-state study can be the equivalent of the right to attend the state university.

See 45 Yale Law Journal, *supra*.

Probably no course in a foreign law school would offer the advantages of the study of law in a state university, with the incidental opportunity of observing the local courts.

Pearson v. Murray, *supra*;

20 Minn. L. Rev. 673, 674: case comment (1936);

See Record, pp. 194-195.

But under any circumstances the scholarships provided by the Lincoln University Act are inadequate, and the test of equality adopted by the Missouri Supreme Court is basically wrong (R. 229).

The prohibitions of the Fourteenth Amendment operate on the states: it is the State which may not deny the equal protection of the laws. The test of equality is whether the

State accords the white student and the Negro student substantial equality of treatment.

Hooker v. Town of Greenville, 130 N. C. 472, 42 S. E. 141 (1902).

Thus assuming that a Negro student could be compensated by a money grant for his exclusion solely because of race from the state university, the state would have to give him a sum not less than the per capita contribution which the state makes to the legal education of a white student, figuring not only current expenditure but making a pro-rata allowance for the capital investment in land, buildings and equipment as well—as for example the law building, the law library and other capital items (R. 229).

The short answer to the test adopted by the Missouri Supreme Court in the principal case that petitioner has equality because he does not have to pay as much for his legal education outside the state with tuition given as the white student in the School of Law of the University of Missouri with tuition to pay, is that petitioner expressly disclaims in his Reply any claim to favored treatment because of his race or color (R. 44-45).

Regardless of the legislature's intentions in passing the Lincoln University Act, its effect has been to perpetuate inequality.

See 82 U. Pa. Law Review 157, 163-164: annotation (1933).

POINT III

The Registrar and Curators of the University of Missouri Failed to Establish That the State Had Afforded Petitioner the Equal Protection of the Laws in the Face of Excluding Him From the School of Law of the University of Missouri Solely Because of His Race or Color.

When petitioner has once established that the State has excluded him from the sole public School of Law in the State solely because of race or color, he has established a *prima facie* case which must be met.

See *Gleason v. University of Minnesota*, 104 Minn. 359, 116 N. W. 650 (1908).

Respondent's Return (R. 23-39) was in substance a plea of confession and avoidance which put the affirmative of the issue of equivalence on respondents and threw on them the burden of proof.

This proper placing of the burden of proof is very important to the protection of petitioner's constitutional rights. It is impossible to read the record in this case without being struck by the attitude of evasion and forgetfulness on the part of the officials of the University of Missouri when called by petitioner (R. 92-107, 122-123); yet all the information requested was all in possession of respondents and their witnesses.

See Jones, Evidence (2d ed.), sec. 181.

For example, Dean Masterson of the School of Law of the University of Missouri could detail down to the last odd number the cases in the casebooks used in his School of Law (R. 111-113), where few Missouri cases appear, but could not recall the policy of the Missouri Law Review which concentrates on Missouri law (R. 100-103, 141-144). Nor could he speak for the manner in which his instructors

conduct their courses (R. 116) or the value of the law library (R. 191).

Respondents could produce itemized figures as to railroad distances and railroad fares (R. 152) but displayed unbelievable unfamiliarity with the fiscal operation of their own School of Law (R. 122-123).

If the burden of proof is placed on the respondent officers of the University of Missouri, no argument is needed to establish that they have failed to establish that the State has accorded petitioner a substantially equal opportunity to study law compared to the opportunity accorded white students in the School of Law of the University of Missouri.

POINT IV

Mandamus Against the Registrar and the Curators of the University of Missouri Was the Proper Remedy for the Protection of Petitioner's Constitutional Rights.

On the facts of this case petitioner's remedy for the protection of his constitutional rights was an action of mandamus against the Registrar and Curators of the University of Missouri to compel them to enroll him in the School of Law. There was no reason for his proceeding against the Board of Curators of Lincoln University.

The duties imposed on the Board of Curators of Lincoln University under the Act of 1921 were mandatory.

Lincoln University v. Hackmann, 295 Mo. 118, 243 S. W. 320 (1922).

but the mandate was either to furnish petitioner a law school at Lincoln University or arrange to pay his tuition at an adjacent state university (R. 219).

Petitioner could not force the Board of Curators of Lincoln University to provide him a law school because section 7 of the Act gave them discretionary power to decide when such a school was necessary or practicable (R. 222-223).

Mandamus will not lie to control discretionary action on the part of officials.

State ex rel. Keck v. Seibert, 130 Mo. 202, 32 S. W. 670 (1895.)

Further, in view of the fact that no means were available to start a law school at Lincoln University (R. 130-131), the question is moot (R. 72-73).

For the reasons suggested in the Argument II, *supra*, the scholarship provisions under the Act of 1921 were inadequate, so that petitioner had only one source from which to seek the equal protection of the laws: The Curators of the University of Missouri.

The admission of a qualified citizen to a state university is not a mere privilege but a right,

Pearson v. Murray, *supra*,

which cannot be withheld without cause, and for the protection of which mandamus will lie.

Gleason v. University of Minnesota, *supra*.

CONCLUSION

The struggle of the Negro to attain an education and improve the standard of his citizenship in the midst of an indifferent or hostile environment is one of the epics of America. It is time that the nation recognized it harms itself by not forcing the states to accord him truly equal protection of the laws as guaranteed by the Federal Constitution.

It is respectfully submitted that the highest considerations of public justice require that this Court issue its writ of certiorari, and review and reverse the judgment of the Supreme Court of Missouri in this case.

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HENRY D. ESPY,

Attorneys for Petitioner.

LEON A. RANSOM,

EDWARD P. LOVETT,

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Of Counsel.

APPENDIX

Constitution of Missouri, 1875, Art. XI, Education

Sec. 1. *Free schools—school ages.* A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years.

Sec. 3. *Colored children, separate schools for.* Separate free public schools shall be established for the education of children of African descent.

Sec. 5. *State university—curators.* The General Assembly shall, whenever the public school fund will permit and the actual necessity of the same may require, aid and maintain the State University, now established, with its present departments. The government of the State University shall be vested in a Board of Curators, to consist of nine members to be appointed by the Governor, by and with the advice and consent of the Senate.

Revised Statutes, Missouri, 1929

Sec. 9657. All youths, resident of the State of Missouri, over the age of sixteen years, shall be admitted to all the privileges and advantages of the various classes of all the departments of the university of the State of Missouri, without payment of tuition: Provided, that each applicant for admission therein shall possess such scholastic attainments and mental and moral qualifications as shall be prescribed in rules adopted and established by the board of curators; and provided further, that nothing herein enacted shall be construed to prevent the board of curators from collecting reasonable tuition fees in the professional departments, and the necessary fees for maintenance of the laboratories in all departments of the university, and establishing such

other reasonable fees for library, hospital, incidental expenses or late registration as they may deem necessary.

Lincoln University (Mo.) Act

Mo. Laws of 1921, pp. 86-87 (S. B. 435)

Section 1. *Repealing all acts or parts of acts wherein Lincoln institute is dealt with and enacting a new section.*—

Article XVIIa, of chapter 102, Revised Statutes of Missouri, 1919, and all acts or parts of acts, sections and parts of sections, inconsistent herewith, wherein Lincoln institute is dealt with in any way, is hereby repealed and a new article to be known as article XVIIa, is hereby enacted, the same to read as follows:

Article XVIIa, section 1. *Changing name of Lincoln institute to Lincoln university.* The name of the Lincoln institute is hereby changed to the Lincoln university.

Sec. 2. *Control vested in board of curators.* The control of the Lincoln university shall be vested in a board of curators to be constituted as follows: The State superintendent of instruction, ex officio, and eight members, at least four (4) of whom shall be Negroes. There shall be no restrictions as to residence except that all appointees shall be citizens of Missouri and shall reside within the state.

Sec. 3. *Board of curators authorized to reorganize.* The board of curators of the Lincoln university shall be authorized and required to reorganize said institution so that it shall afford to the Negro people of the State opportunity for training up to the standard furnished at the State university of Missouri whenever necessary and practicable in their opinion. To this end the board of curators shall be authorized to purchase necessary additional land, erect necessary additional buildings, to provide necessary additional equipment, and to locate in the county of Cole the respective units of the university where, in their opinion, the

various schools will most effectively promote the purposes of this Act.

Sec. 4. Governor shall appoint members—term of office. As soon as possible after the passage of this Act; the governor shall by and with the advice and consent of the senate appoint four members of the board of curators to hold office until January 1, 1923, four to hold office until January 1, 1925; and their successors shall be appointed for terms of four years. Within thirty days after the members of the board of curators shall have been appointed and qualified, the governor shall call a meeting for the purpose of organization, at Jefferson City, at such place as he may designate.

Sec. 5. All responsibilities shall pass to board of curators. With the organization of the board of curators the board of regents of the Lincoln institute shall terminate and all of their responsibilities and privileges, under the several statutes relating to the Lincoln institute shall pass immediately to the board of curators.

Sec. 6. Board to organize and have same powers as curators of State university of Missouri. It is hereby provided that the board of curators of the Lincoln university shall organize after the manner of the board of curators of the State university of Missouri and it is further provided that the powers, authority, responsibilities, privileges, immunities, liabilities and compensation of the board of curators of the Lincoln university shall be the same as those prescribed by statute for the board of curators of the State university of Missouri, except as stated in this act.

Sec. 7. May arrange for attendance at university of any adjacent state—tuition fees. Pending the full development of the Lincoln university, the board of curators shall have the authority to arrange for the attendance of Negro residents of the State of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the

state university of Missouri, and which are not taught at the Lincoln university and to pay the reasonable tuition fees for such attendance, provided that whenever the board of curators deem it advisable they shall have the power to open any necessary school or department.

Sec. 8. *Appropriating five hundred thousand dollars to carry out purposes of act.* To enable the board of curators to carry out the purposes of this act, as stated specifically in section 3, and subject to the provisions of section 6 of the same, there is hereby appropriated from any unappropriated portion of the general school funds the sum of five hundred thousand (\$500,000) dollars. Approved April 15, 1921.

Kentucky Scholarship Law

(Acts 1936, Ch. 43, Secs. 1-3)

Sec. 1. That pending the full development of the educational institutions of the Commonwealth of Kentucky, all bona fide residents of this State at the time of making written application for the benefits provided in this Act and have been such residents continuously for five (5) years next preceding the time of filing said application, and who are duly qualified for matriculation in courses of study offered at the University of Kentucky, but who, because of Section one hundred eighty-seven of the Constitution of Kentucky cannot pursue such courses at the University of Kentucky or other State institutions at which such courses are offered, or who have otherwise qualified to pursue such courses therein, and who are now pursuing or may hereafter pursue such courses in educational institutions outside of the State whereof no courses of study are provided for such persons within this State, shall have their tuition and fees paid at such institutions by the Commonwealth of Kentucky.

Section 2. That such tuition and fees be ascertained by the State Superintendent of Public Instruction and paid

upon requisition of him out of funds not otherwise appropriated.

Section 3. That the State Board of Education shall prescribe the rules and regulations governing the granting of State aid under this act. In event the funds appropriated for the purpose of carrying out the provisions of this act are insufficient for the purpose in any year, said board of education shall have the right to prorate the same among such persons whose applications are approved therefor pursuant to the provisions of this Act; and provided further, that not more than One Hundred and Seventy-five (\$175.00) Dollars shall be allowed to any such person for the purposes and under the provisions of this Act during any one school year of nine (9) months.

Maryland Scholarship Law

(Laws 1937, Ch. 506, Section I)

Section 1. *Be It Enacted by the General Assembly of Maryland,* That a sub-title and eight new sections be and the same are hereby added to Article 49B, title "Inter-racial Commission," said sub-title and eight new sections to follow immediately after Section 3, of said Article, to be known as Sections, 4, 5, 6, 7, 8, 9, 10 and 11 and to read as follows:

4. The sum of thirty thousand dollars (\$30,000) provided in the 1938-39 Budget for scholarships and partial scholarships for negroes and expenses of awarding same, and all sums hereafter appropriated for such purpose, shall be used to provide educational facilities and opportunities for negroes of this State equal to those now provided for white persons and especially to equip such negroes for the professions, such as Medicine, Law, Dentistry and Pharmacy, or any other profession or branch of education for which the State of Maryland provides opportunities for white students

and for which it does not provide opportunities for negro students.

5. Whenever any bona fide negro resident and citizen of this State, possessing the qualifications of health, character, ability and preparatory education required for admission to the University of Maryland, desires to obtain an education not provided for either in Morgan College or Princess Anne College, he may make application for a scholarship, provided by the funds mentioned in the foregoing section, so that he may obtain aid to enable him to attend a college or university where equal educational facilities can be provided and furnished, whether or not such an agency or institution is operated by the State or under some other arrangement, and whether or not such facilities are located in Maryland or elsewhere. Under such conditions, it shall be provided that out of the scholarship funds mentioned in the foregoing section, the applicant, if he possesses the proper qualifications, may have paid to him or direct to the institution which he is to attend, such sum, if any, as may be necessary to supplement the amount which it would cost him to attend the University of Maryland, so that such person will be enabled to secure educational facilities, training and opportunities equal to those provided for white students, without additional cost to such person. Be it provided, however, that the Commission hereinafter established, shall, in its discretion, have authority, in exceptional cases, to allow a grant for a scholarship in reasonable excess of the differential above referred to. In determining the comparative costs of attending any of the institutions to which scholarships may be provided, there shall be taken into consideration tuition charges, living expenses and costs of transportation.

6. A commission consisting of nine persons is hereby established to carry out the provisions of this Act. It shall be known as the "Commission on Scholarships for Negroes." It shall consist of the President of Morgan College, the Principal of Princess Anne College, the Director of Admissions of the University of

Maryland, who shall serve as ex-officio members, and six other citizens of the State, to be appointed by the Governor, who shall hold their appointments for terms of four years; provided, however, that James F. Walker, Edward N. Wilson and Charles E. Hodges, be and the same are hereby appointed to the said Commission to serve for two years from the effective date of this Act, and Dr. Ivan E. McDougale, Violet Hill Whyte and Dr. Francis M. Wood be and the same are hereby appointed to the said Commission to serve four years from the effective date of this Act, and that the said Dr. McDougale shall be the first Chairman of this Commission, to hold such position during his term of four years; that thereafter the Governor shall appoint three members of said Commission every two years and may designate one of said members as the Chairman thereof, and the Governor shall have power to fill vacancies occurring in the personnel of the said Commission; and provided further that this Commission shall not be deemed to have any power whatsoever that might infringe upon the powers of the Board of Trustees of Morgan College or the Board of Regents of the University of Maryland. The members of this Commission shall not receive salaries but may employ such secretarial and clerical help as may be needed to carry out the purpose of this Act. The appropriations made in the Budget from time to time for scholarships and for the expenses of the Commission shall be paid on proper vouchers submitted by the Commission.

7. The Commission shall have power to establish rules and regulations to govern the award of these scholarships; provided, however, that two of these rules shall be (1) that no scholarship shall be awarded to any student or prospective student who would not be qualified for admission and accepted by the University of Maryland, unless denied admission for other reasons, for the particular work that such student desires to undertake; and (2) that no student, after having been awarded such a scholarship and while attending the college or university or institute to which said scholarship may be awarded, shall be qualified to hold the scholarship and to continue thereunder unless he

maintains the same educational standards as would have to be maintained if he were taking the same work at the University of Maryland. It is declared to be the intent of this Act that the scholarships herein referred to shall supplement and not in any way duplicate work given at Morgan or Princess Anne Colleges, so that members of the negro race may receive the full benefit of the provisions of this Act, provided, however, that scholarships granted to students now at Morgan College, or to students at any other college, shall be continued until graduation of said students, provided graduation takes place within a reasonable time. The Commission shall make a report of its activities to the General Assembly of 1939, and shall include therein a report of any study of higher education for negroes, and the State's relation thereto, that, in its discretion, the Commission may make; and especially shall the Commission consider the desirability and possibility of Morgan College becoming a State-owned college for Negroes, or whether it would be more practical for said College to remain under its present control with the State continuing to grant substantial aid under an agreement that it would carry on certain educational work for the state. The Commission is hereby authorized to confer with the Board of Trustees of Morgan College in order that it may present in its report recommendations as to the most practicable and desirable way of integrating Morgan College with the State's system of higher education for Negroes.

Oklahoma Scholarship Law

(Session Laws 1935, Ch. 34, Act I, Secs. 1-3; as Amended by Session Laws 1936-37, Ch. 34, Act XI, Sec. I)

Section 1. That all persons, who are bona fide residents of this State at the time of making written application for the benefits provided in this Act and have been such residents continuously for five (5) years next preceding the time of filing said application, and who submit with said application satisfactory proof of good moral character,

and of ability to pursue the courses of study hereinafter referred to, and who have completed at least two years of college work preparatory to special courses of study, additional or further courses of study, to be pursued in educational institutions outside of the State and of their own choice, or who have otherwise qualified to pursue such courses therein, and who are now pursuing or may hereafter pursue in such institutions such courses of study and which courses of study are similar to those courses taught in the University of Oklahoma or other state-supported Oklahoma educational institutions, and, because of the provisions of section 3, of Article XIII, of the Constitution of Oklahoma, such persons cannot pursue such courses of study in the University of Oklahoma or other state-supported Oklahoma educational institutions, and no courses are taught in state-supported educational institutions of Oklahoma provided for such persons, shall have their tuition and fees paid at such educational institutions by the State of Oklahoma to the amount that such tuition and fees exceed the amount of any tuition and fees required of a resident of this state at the University of Oklahoma to pursue such courses of study; provided, that for such tuition and fees there shall not be allowed to any such person more than Two Hundred Fifty (\$250.00) Dollars during any regular school year of nine months, and not more than Twelve Dollars and fifty cents (\$12.50) per week during any summer school term; and provided further, that no such tuition and fees shall be allowed to any such person for any part of such course of study not completed by such person. That in addition to such tuition and fees, the State of Oklahoma shall pay as and for the cost of transportation of each of such persons to and from such institutions three (3) cents per mile for the necessary additional mileage by the most direct and usually travelled route from the place of residence of such person to the nearest standard educational institution outside of Oklahoma where such course or courses of study could be pursued by such person

over and above the mileage from the place of residence of such person to the University of Oklahoma at Norman, Oklahoma, and return therefrom: provided, that in event such course or courses of study pursued or to be pursued by any such person is not taught at the University of Oklahoma and is taught in one or more of the other state-supported Oklahoma educational institutions at which such person cannot pursue the same because of said constitutional provisions, then the tuition and fees charged at such institution which is the nearest to the place of residence of such person and the location of said institution shall be the basis for ascertaining in like manner the benefits to be granted to such person under the provisions of this Act.

Section 2. That all persons, who have completed or may hereafter complete a course of study in a state-supported educational institution of Oklahoma and have been or may hereafter be graduated with a degree therefrom (and which degree does not have a similar value and recognition to such a degree from the University of Oklahoma or other state-supported Oklahoma educational institution in which such persons cannot pursue a similar course of study because of the provisions of Section 3, of Article XIII, of the Constitution of Oklahoma), and who are now pursuing, or may hereafter pursue such a course of study in an educational institution outside of the State for the purpose of obtaining therefrom a degree of the same kind as held by such person from said state-supported educational institution of Oklahoma and of similar value and recognition as such a degree from the University of Oklahoma or other said state-supported Oklahoma educational institutions, and who shall otherwise meet the requirements of Section 1 hereof, shall also be entitled to receive the benefits provided in this Act.

Section 3. That the State Board of Education of Oklahoma is hereby authorized and directed to administer the provisions of this Act, and to make from time to time all

rules and regulations necessary to carry out the purposes of this Act. In event the funds appropriated for the purpose of carrying out the provisions of this Act are insufficient for the purpose in any year, said Board of Education shall have the right to prorate the same among such persons whose applications are approved therefor pursuant to the provisions of this Act.

Tennessee Scholarship Law

(Acts 1937, Ch. 256, Secs. 1-2)

That the State Board of Education is hereby authorized and directed to establish scholarships for colored students, payable out of the State appropriations made for the Agricultural and Industrial College for Negroes, under the terms and conditions hereinafter set forth. Such scholarships shall be granted to colored students to take professional courses not offered in the said Agricultural and Industrial College for Negroes, or other State-maintained institution for Negroes, but which are offered for white students in the University of Tennessee.

Such scholarships shall be granted only to bona fide residents and citizens of this State who possess the qualifications, the health, character, the ability and preparatory education required for admission to the University of Tennessee. Such scholarships shall be in an amount sufficient to give the recipient thereof educational facilities equal to those provided by the University of Tennessee, without cost to the recipients in excess of the cost which would be required to attend the University of Tennessee.

That the scholarships herein provided for shall be granted to the nearest University or institution of learning which the recipient can lawfully attend and which offers educational facilities equal to those of the University of Tennessee, whether such university or institution is located in Tennessee or elsewhere. In determining the amount of each scholarship the State Board of Education shall take into

consideration the living expenses, the cost of transportation and the tuition charges at the institution to be attended as compared with such expenses and charges at the University of Tennessee. The State Board of Education shall pay the amount of such scholarships to the recipient or to the institution attended by him, as and when needed. Such payment shall be made out of the funds appropriated by the State for the Agricultural and Industrial College for Negroes but in no event shall the total expenditure for such scholarships exceed that proportion of the appropriation for the Agricultural and Industrial College for Negroes which the expenditure of State funds for professional courses at the University of Tennessee bears to the total State appropriation for the University of Tennessee.

Provided, that the total expenditures under this Act shall not exceed the sum of Twenty-five hundred (\$2500.00) Dollars per annum.

The State Board of Education, acting as the Board of Trustees for the Agricultural and Industrial College for Negroes, is hereby authorized to make such rules and regulations as may be necessary for the purpose of carrying this Act into effect.

Virginia Scholarship Law

(Acts 1936, Ch. 352)

Be it enacted by the General Assembly of Virginia, that whenever any bona fide resident and citizen of this State, regardless of race, possessing the qualifications of health, character, ability and preparatory education customarily required for admission to any Virginia State College, State University, or other State institution of higher learning and education, or any branch or department thereof, upon application, is denied admission thereto, for any reason, by the board which constitutes the governing authority of such institution, if it appear to the satisfaction of said board that such person is unable to obtain from another

such or similar Virginia State College, State University, or State institution, educational facilities equal to those applied for, and that such equal educational facilities can be provided and furnished to said applicant by a college, university or institution, not operated as an agency or institution of the State, whether such other facilities are located in Virginia or elsewhere, the said board of such State college, university, or institution so denying admission, is hereby authorized, out of the funds appropriated to such institution, to pay to such person, or the institution attended by him, as and when needed, such sum, if any, as may be necessary to supplement the amount which it would cost such person to attend the said State college, university or institution, so that such person will be enabled to secure such equal educational facilities elsewhere without additional cost to such person. In determining the comparative costs of attending the said respective institutions the board shall take into consideration tuition charges, living expenses and costs of transportation.

West Virginia Scholarship Law

(W. Va. Code 1937, Ch. 18, Art. 13, Sec. 1894 (2))

State Aid to Students Taking Advanced Courses Outside State. All bona fide residents of this State who have been residents of the State for five years, and who have completed courses of study equivalent to two years of college grade preparatory to special courses to be pursued outside of the State, or who have otherwise qualified to enter such courses, and who are now pursuing or may hereafter pursue, courses of study in educational institutions outside of the State the same as those taught in the West Virginia University or other West Virginia schools, and, because of section eight, article twelve of the Constitution of West Virginia, cannot pursue such course in the West Virginia University, or other state schools, and no other courses are taught in state supported educational institutions pro-

vided for them, shall have their annual tuition and fees paid by the state to the amount paid by a nonresident student of the state university or other state supported schools, over and above the amount of any tuition and fees paid by a resident student of the State university or other schools, such tuition cost to be ascertained by the state board of education for the preceding school year and paid upon recognition of the state superintendent of schools out of funds appropriated for that purpose. The Negro board of education and the state board of education, acting jointly, shall prescribe rules and regulations governing the granting of aid under this section. (1927, C. 10, Secs. 1-3; 1929, C. 34, Secs. 1-3; 1933, Ex. Sess., C. 12.)

**Statistics on Negro Population and School Attendance in
Sixteen Southern States Which Exclude Negroes
From the State Universities**

	1930 Population' Negro	1930 Negro Schools Attendance'	1933-34 Negroes in Institutions of Higher Learning'
Alabama _____	944,834	186,883	1,464
Arkansas _____	478,463	99,989	228
Delaware _____	32,602	5,807	77
Florida _____	431,828	71,992	469
Georgia _____	1,071,125	211,638	1,820
Kentucky _____	226,040	39,361	797
Louisiana _____	776,326	147,048	1,281
Mississippi _____	1,009,718	217,840	441
Missouri _____	223,840	33,137	464
No. Carolina _____	918,647	218,320	2,533
Oklahoma _____	172,198	37,976	539
So. Carolina _____	793,681	182,791	626
Tennessee _____	477,646	91,268	2,370
Texas _____	854,964	172,384	1,850
Virginia _____	650,165	141,093	2,130
W. Virginia _____	114,893	21,861	804
	9,176,970	1,879,388	17,893

¹ *Negroes in the United States, 1920-1932* (Bureau of the Census), C. II, table 12, p. 9.

² *Idem.*, C. XI, table 15, p. 214.

³ *Biennial Survey of Education, 1932-1934* (U. S. Bureau of Education), C. IV, part IV, summary of tables 18A, parts 1-7 incl., 18B, parts 1 and 2, pp. 120-199.

Negro Illiteracy (National)

From Negroes in the United States, 1920-1932
(Bureau of the Census)

C. XII, Table 4, p. 231

1930 _____	16.3%
1920 _____	22.9%
1910 _____	30.4%
1900 _____	44.5%
1890 _____	57.1%
1880 _____	70.0%
1870 _____	81.4%

Statistics on Education of the Negro in Missouri

From the 88th Report of the Public Schools of Missouri by
the State Superintendent of Schools for the School
Year Ending June 30, 1937

(Covering only rural, elementary and high schools)

- (p.46) Negro population: 1900—161,000; 1930—224,000.
Negro illiteracy: 1863—95%; 1930—10%.
Negro enrollment in rural, elementary and high
schools: 1900—15,000; 1937—46,012.
- (p.47) Negro teachers in rural, elementary and high
schools: 1900—385; 1937—1,401.
Negro high schools: 1920—6; 1937—62.
First class Negro high schools: 1937—17.

Distribution by Missouri of Federal Funds Received for Higher Education¹

Fiscal year ending June 30, 1934

	Univ. Missouri	Lincoln Univ.	Total
1862 land-grant fund	20,361	—	20,361
Other land grant funds	7,320	—	7,320
Morrill-Nelson funds	46,875	3,125	50,000
Hatch-Adams funds	30,000	—	30,000
Smith-Lever funds	156,882	—	156,882
Smith-Hughes funds	13,822	—	13,822
Purnell funds	60,000	—	60,000
Capper-Ketcham funds	36,382	—	36,382
Additional co-operative extension funds	34,000	—	34,060
	405,642	3,125	408,767

Percentage: Negro population, 1930 _____ 6.2%
Federal funds to Lincoln University _____ .8%

¹ Biennial Survey of Education, 1932-1934 (U. S. Bureau of Education),
C. IV, part V, table A1, pp. 486-487.

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FILED

NOV 9 1938

CHARLES ELMORE DROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1937

No. 57

STATE OF MISSOURI EX REL. LLOYD L. GAINES,
Petitioner,

vs.

S. W. CANADA, Registrar of the University of Missouri, and
THE CURATORS OF THE UNIVERSITY OF MISSOURI,
a Body Corporate,
Respondents

SUPPLEMENTAL LIST OF AUTHORITIES FOR PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1937

No. 57

STATE OF MISSOURI EX REL. LLOYD L. GAINES,
Petitioner,

vs.

S. W. CANADA, Registrar of the University of Missouri, and
THE CURATORS OF THE UNIVERSITY OF MISSOURI,
a Body Corporate,
Respondents

SUPPLEMENTAL AUTHORITIES FOR THE PETITIONER

POINT I (Brief, p. 17)

The State of Missouri Denied Petitioner the Equal Protection of the Laws in Excluding Him from the School of Law of the University of Missouri Solely Because He Is a Negro.

Citizen and taxpayer has a proprietary interest in state-supported educational institutions.

Wright v. Board of Education, 295 Mo. 466, 246 S. W. 43 (1922).

POINT II (Brief, p. 18)

The Facilities Afforded Petitioner Under the Lincoln University Act of 1931 to Study Law Are Not Substantially Equal to the Facilities Afforded White and Other Non-Negro Students by the State in the School of Law of the University of Missouri.

The policy of the Missouri Law Review indicates the University of Missouri School of Law is a local law school emphasizing Missouri law.

1 Mo. Law Rev. 61 (1936).

2 Mo. Law Rev. 64 (1937).

POINT III (Brief, p. 21)

The Registrar and Curators of the University of Missouri Failed to Establish That the State Had Afforded Petitioner the Equal Protection of the Laws in the Face of Excluding Him from the School of Law of the University of Missouri Solely Because of His Race or Color.

Burden of proof is determined by considerations of policy and fairness.

5 Wigmore, Evidence (2d ed.), Sec. 2486.

2 Jones, Evidence (2d ed.), Secs. 485-487, 494-495.

Wright-Blodgett Co. v. U. S., 236 U. S. 397 (1915).

(The citation on page 21, Petitioner's Brief, of *Jones, Evidence (2d ed.)*, Sec. 181, is incorrect and should be ignored.)

The burden of proof, as distinguished from the burden of going forward is a matter of substantive law.

Central Vermont Ry. Co. v. White, 238 U. S. 507 (1915).

A prima facie case of discrimination is made out under all the authorities on a mere showing of exclusion of Negroes from a public function solely because of race.

See *Norris v. Alabama*, 294 U. S. 587 (1935).

POINT IV (Brief, p. 22)

Mandamus Against the Registrar and the Curators of the University of Missouri Was the Proper Remedy for the Protection of Petitioner's Constitutional Rights.

There was no necessity of a prior demand on the board of curators of Lincoln University to inaugurate a law school or legal education at Lincoln University: respondents confess such would have been futile (see Respondents' Brief, p. 53).

Montana Nat. Bank v. Yellowstone County, 276 U. S. 499 (1928).

Mandamus lies for the performance of a ministerial duty.

Piper v. Big Pine School Dist., 193 Cal. 664, 226 P. 926 (1924).

CORRECTION (Brief, p. 35)

The Virginia Scholarship Law, Acts of 1936, Ch. 352, has been amended by Acts of 1938, Ch. 125.

Acts of Assembly, Virginia, 1938, C. 125:

1. Be it enacted by the General Assembly of Virginia, That an act entitled "An act to provide equal educational facilities for certain persons denied admission to Virginia State colleges, universities and institutions of higher learning" approved March twenty-seventh, nineteen hundred and thirty-six be amended and re-enacted so as to read as follows:

"Section 1. Whenever any bona fide resident and citizen of this State, regardless of race, possessing the

qualifications of health, character, ability and preparatory education customarily required for admission to any Virginia State college, State university, or other State institution of higher learning and education, or any branch or department thereof, upon application, is denied admission thereto, for any reason, by the board which constitutes the governing authority of such institution, if it appear to the satisfaction of the State Board of Education that such person is unable to obtain from another such or similar Virginia State college, State university, or State institution, educational facilities equal to those applied for, and that such educational facilities can be provided and furnished to said applicant by a college, university or institution not operated as an agency or institution of the State, whether such other facilities are located in Virginia or elsewhere, the State Board of Education is hereby authorized, out of the funds appropriated for such purpose, to pay to such person, or the institution attended by him, as and when needed, such sum, if any, as may be necessary to supplement the amount which it would cost such person to attend the said State college, university or institution, so that such person will be enabled to secure such equal educational facilities elsewhere without additional cost to such person. In determining the comparative costs of attending the said respective institutions, the State Board of Education shall take into consideration, tuition charges, living expenses and costs of transportation.

"Section 2. Whenever any person has been denied admission to any Virginia State college, State university, or other State institution of higher learning and education, or any branch or department thereof, if such person possesses the qualifications, health, character, ability and preparatory education customarily required for admission there, the president of such institution, or a dean or department head designated by the president for that purpose, shall issue a certificate addressed to the State Board of Education certifying the fact of the applicant's denial of admission and his qualification for admission and forward same to the State Board of Education. The said certificate shall be prima facie evidence of the facts therein stated. Nothing in said

certificate contained, however, shall prevent the State Board of Education from making such further investigation of any application for money to provide equal educational facilities as the said Board of Education may deem proper."

Respectfully submitted,

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● SIDNEY R. REDMOND,
● HENRY D. ESPY,

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Of Counsel:

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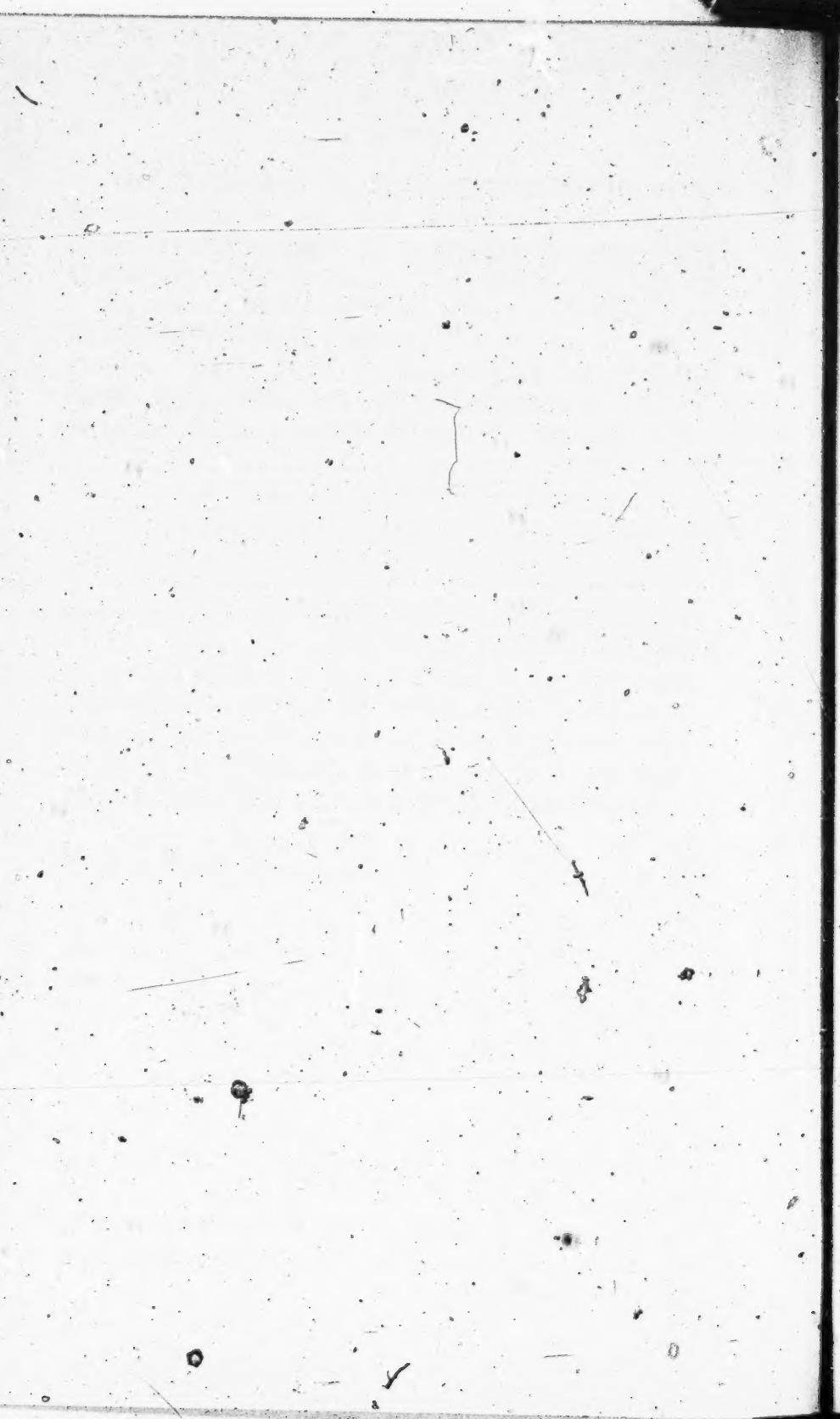
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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 57.

STATE OF MISSOURI EX REL. LLOYD L. GAINES,
PETITIONER,

VS.

S. W. CANADA, REGISTRAR OF THE UNIVERSITY
OF MISSOURI, AND THE CURATORS OF THE
UNIVERSITY OF MISSOURI, RESPONDENTS.

REFERENCE TO OPINION BELOW.

The opinion below (not yet officially reported) appears in 113 S. W. (2d) 783, and at pages 210-224 of the record.

STATEMENT OF THE CASE.

This case is pending upon a petition for certiorari to review a judgment of the Supreme Court of Missouri, affirming a judgment of the Circuit Court of Boone County, Missouri, denying a writ of mandamus. Petitioner sought mandamus to compel respondents, the

Registrar and Board of Curators of the University of Missouri, to admit petitioner, a negro, as a student in the School of Law in the University of Missouri. The Supreme Court of Missouri held that respondents had properly denied petitioner's application for admission (a) because the laws of Missouri provide for separation of the races for the purpose of higher education, and do not entitle a negro to admission as a student in the University of Missouri; and (b) because by the Lincoln University Act (Secs. 9616-9624, R. S. Mo., 1929) the state had provided for petitioner an opportunity to receive a legal education which is equal to that provided for white students in the University of Missouri, and therefore petitioner's rights under the equal protection clause of the Fourteenth Amendment were not infringed (R. 210-224).

In his petition and supporting brief petitioner omits material facts, erroneously states other facts, and in several instances makes half true statements which convey a misleading impression of the evidence. We therefore deem it necessary to submit our own statement of the case.

Petitioner, a young man now 27 years of age, a native of Mississippi, came to Missouri in 1926 and received his education in free public schools maintained by Missouri for the education of negroes, including education in common school, high school and in Lincoln University, a state university for negroes. He was graduated from the latter institution in August, 1935, with an A.B. degree (R. 210, 57, 78-79). He thereupon made application for admission as a student in the school of law in the University of Missouri (R. 210, 63), and later filed with its registrar a transcript of his credits as a student in Lincoln University (R. 60-61, 64). Petitioner's communication with the registrar was entirely by

correspondence, and until he filed the transcript of his credits from Lincoln University there was nothing in the correspondence to apprise the registrar that petitioner was a negro (R. 60).

Upon the filing of the transcript from Lincoln University it became obvious to the registrar that petitioner must be a negro. Thereupon the registrar telegraphed petitioner suggesting that he communicate with President Florence of Lincoln University regarding arrangements for his legal education (R. 65). President Florence then wrote petitioner calling his attention specifically to the provisions of the Lincoln University Act of 1921, and offering petitioner aid thereunder (R. 72-73). This act provides higher education for negroes equal to that furnished to white students in the University of Missouri (Sec. 9618, R. S. Mo., 1929), and provides that pending the full development of Lincoln University the Lincoln University board of curators shall arrange for the attendance of any negro resident of Missouri at the university of any adjacent state, to take any course of study which is provided in the University of Missouri but which is not taught at Lincoln University; and requires the Lincoln University curators to pay the tuition fees for such temporary out-of-state attendance (Sec. 9622, R. S. Mo., 1929).

Petitioner admits that he was thus fully advised of the provisions made for his benefit by the Lincoln University Act of 1921, and that he fully understood his rights under that statute. He says that after full consideration he deliberately refused to avail himself of such rights (R. 74, 82, 83, 84). He testifies that within two days after he received President Florence's letter calling his attention to his right to receive a legal education through Lincoln University, he got in communication with the National Association for the Advancement

of Colored People (R. 82), and discussed his rights with the counsel for that association (R. 84), who advised him to refuse to avail himself of the rights provided for him by the Lincoln University Act, and to "keep on corresponding with Missouri University" (R. 84).

In a deposition taken before trial petitioner was asked whether, if a good law school were established at Lincoln University on a par with the one at the University of Missouri, he would attend it; and on the advice of counsel petitioner refused to answer this question (R. 88-89).

Petitioner admitted that he had refused to avail himself of any of the rights provided for him by the Lincoln University Act (R. 85-86), and had never made application to Lincoln University for education in the law, either in a school of law to be established in that institution, or, pending that, in a law school in the state university of any one of the four adjacent states which admit negroes as students (R. 218, 219, 85-86, 136-137). The law schools in the state universities in each of these four adjacent states (Kansas, Nebraska, Iowa and Illinois) admit nonresident negroes as students (R. 87-88); and petitioner is eligible, from a scholastic standpoint and otherwise, to become a student in any one of these four schools (R. 219, 90-91):

If he had seen fit to accept the opportunity open to him, he would have had the right to call upon the Lincoln University curators for an education in the law; and it would have then become the mandatory duty of the Lincoln University curators (*Lincoln University v. Hackmann*, 295 Mo. 118, 124) to establish a school of law in Lincoln University up to the standard of the law school in the University of Missouri (Sec. 9618, R. S. Mo., 1929); and, pending that, to arrange for petitioner's attendance at the school of law in any of the four adjacent state

universities which petitioner might select, and to pay petitioner's tuition fees therein (Sec. 9622, R. S. Mo., 1929).

The petitioner's expense of travel to these adjacent state universities would have been no greater than the traveling expense of students living in various parts of Missouri, who attend the University of Missouri at Columbia (R. 219-220, 90, 151-153); and he would necessarily have had to pay living expenses, regardless of which university he attended (R. 220).

During the time that petitioner might temporarily attend an adjacent state university, pending the establishment of a school of law in Lincoln University, the Lincoln University curators would be required by the statute to pay the full amount of his tuition fees (Sec. 9622, R. S. Mo., 1929). These tuition fees for the first year of the law course range from \$109.75 to \$178.00 in the four schools (R. 220, 157-8, 159-160, 161, 162). White students attending the school of law in the University of Missouri must pay their own tuition fees, which for the first year amount to \$127.50 (R. 220, 154-155), and they receive no reimbursement from the state. Petitioner would, therefore, temporarily enjoy a pecuniary advantage over white students of law attending the University of Missouri, pending the establishment of a school of law in Lincoln University.

The law schools in the universities of the adjacent States of Kansas, Nebraska, Iowa and Illinois are each schools of high standing, members of the Association of American Law Schools, and on the approved list of the American Bar Association (R. 219, 113). Petitioner's evidence shows without dispute that a student desiring to practice law in Missouri can get as sound, comprehensive and valuable legal education in any one

of these four adjacent law schools as he could get in the University of Missouri Law School (R. 219, 117-118). In each of these four adjacent law schools, and in the law school of the University of Missouri, the system of education is exactly the same; and the aim and purpose of the schools, as of all modern law schools, is to give the student such fundamental education in the law as will serve as a basis for the practice of law in any state where the Anglo-American system of law obtains (R. 219, 109). In all of these schools in adjacent states the casebook system of instruction is used (R. 109, 113); and the courses of study and the casebooks used are substantially identical with those in the University of Missouri Law School (R. 219, 155-157, 158-159, 160, 161, 162-163). It frequently happens that law students transfer from one to another of these five law schools (in Missouri, Kansas, Nebraska, Iowa and Illinois Universities), and the courses of study and the quality of instruction in the five schools are so nearly identical that the student loses no time when he transfers, receives full credit for the work done in his former school, and moves right along without any hiatus or loss of stride (R. 219, 114).

In the trial court the petitioner alleged that the school of law in the University of Missouri specializes in Missouri law and procedure, and that in no other school could he study Missouri law and procedure to the same extent and on an equal level of scholarship and intensity (R. 16). The evidence fails to sustain this allegation, and conclusively disproves it. The University of Missouri Law School does not specialize in Missouri law and procedure (R. 219, 99, 100). The school is in no sense a provincial law school adapted merely to educate lawyers for practice in Missouri only

(R. 109). The school teaches the general common-law system as practiced throughout the United States (R. 109). The aim is to lay a thorough general foundation for the practice of law in any jurisdiction where the Anglo-American system of jurisprudence obtains (R. 219, 109, 118). The casebooks used in the school are used generally in law schools over the country, including Columbia, Northwestern, Harvard (R. 116), Kansas University, Nebraska University, Iowa University and Illinois University (R. 109). The casebooks do not contain a disproportionately high number of Missouri cases, there being 6,966 cases in all of the casebooks used in the three-year law course, of which only 97 or 1.2 per cent are Missouri cases (R. 219, 111-113). In the courses taught at the University of Missouri Law School there is no more instruction on Missouri law than would be given a student at the Harvard University Law School (R. 116). Of 3,284 applicants for admission to the bar in Missouri in the five-year period, 1931 to 1935, only 246 applicants studied law at the University of Missouri Law School (R. 144-145). Some of the best lawyers in Missouri are graduates of law schools in other states (R. 117). Upon the foregoing evidence, all of which is a part of petitioner's proof and is undisputed, the Missouri Supreme Court found against petitioner upon his contention that the University of Missouri Law School specializes in Missouri law and procedure (R. 219).

There has never been any demand upon Lincoln University by any negro for a legal education (R. 222, 136, 137). Consequently, no school of law has, up to this time, been established in Lincoln University (R. 77). However, prior to the institution of this suit, the Lincoln University curators were making a complete survey of

the whole subject of negro education in Missouri, to determine what Lincoln University should do for the negro people of the state which it was not already doing; and on the basis of this survey were planning a definite program of expansion (R. 130).

A law school in Lincoln University could be established and operated for a small class, on a level of scholarship and training equal to that in the University of Missouri Law School, for a maximum of \$10,000.00 per year (R. 185-186). The library of the Supreme Court of Missouri, one of the most complete law libraries in the state, and a better one than that at the University of Missouri Law School, is located a few blocks from Lincoln University, and is open to the public both day and night (R. 145, 193). A student in a small class would receive more intensive training than a student would receive in a class of 30 to 50 students, and would practically have the advantage of a private tutor (R. 186). If petitioner were admitted as a student in the University of Missouri Law School, and were taught in a separate class from the white students in accordance with the public policy and tradition of the state, the expense to the state would be as great as it would be to establish a law school in Lincoln University (R. 186).

Petitioner's own evidence shows that the State of Missouri is a pioneer among the states in the field of higher education for negroes, and is the only state in the Union which has established a separate university for negroes on the same basis as the state university for white students (R. 138). Dr. J. D. Elliff testified that during the five years of his incumbency as chairman of the board of curators of Lincoln University, the General Assembly has always given Lincoln University substantially all the money requested by its board for maintenance, operation, expansion and general purposes (Rec.

137). From 1921 to 1935, inclusive, the state has appropriated to Lincoln University \$3,477,153.49 (Laws Mo., 1921, pages 65, 87, 101; Laws Mo., 1923, pages 51, 60, 96; Laws Mo., 1925, pages 57, 78; Laws Mo., 1927, page 88; Laws Mo., 1929, pages 24, 101; Laws Mo., 1931, page 46; Laws Mo., 1933, pages 124, 130; Laws Mo., 1935, page 66). From this total, \$500,000.00 was eliminated by the decision in *Lincoln University v. Hackmann*, 295 Mo. 118, so the net balance appropriated in these years was \$2,977,153.49 (R. 149-150). These appropriations included hundreds of thousands of dollars available for the salaries of professors and instructors generally, as well as for general expenses—thus providing ample funds for the establishment of any professional or graduate courses for which any need might arise (see Appropriation Acts copied in Appendix).

The unexpended balances in the Lincoln University funds were \$311,061.74 on August 9, 1935, the date when petitioner was graduated from Lincoln University and was ready to begin his legal education (R. 8); \$298,620.16 on September 6, 1935, the date when the University of Missouri and Lincoln University respectively began their fall semesters; and \$159,870.73 on April 17, 1936, when this suit was filed (R. 147).

Supplementing the appropriations to Lincoln University above referred to, the General Assembly in the years 1929 to 1935, inclusive, appropriated additional sums aggregating \$55,615.91 as funds available for payment of out-of-state tuition fees (Laws Mo., 1929, page 61; Laws Mo., 1931, page 28; Laws Mo., 1933, pages 9, 87; Laws Mo., 1935, page 113). This special fund is administered by the state superintendent of schools (R. 165-169) who ~~is~~ *ex officio* a member of the Lincoln University board of curators (Sec. 9617, R. S. Mo., 1929). In this special

tuition fund the unexpended balance on August 9, 1935, and September 6, 1935, was \$6,351.18, and on April 17, 1936, was \$2,214.98 (R. 220-221, 165).

While petitioner's counsel in their brief speak disparagingly of Lincoln University, the petitioner himself, who received his academic education there, admits that Lincoln University is a well-managed, well-conducted university, on a plane with the University of Missouri as far as he knows (R. 79-80, 80-81). The record shows that the value of Lincoln University's land, buildings and equipment has grown from \$362,000.00 in 1930 to \$868,854.00 in 1936 (R. 138).

No negro has ever attended or been received as a student in the University of Missouri; no negro except petitioner has ever applied for admission as a student; and it has always been the public policy of the state to provide separate educational systems for negroes and whites (R. 169-170, 171-172, 174-184).

Petitioner admits that he understood it to be the public policy, law and Constitution of Missouri to separate negro and white children for the purposes of education (R. 81). He admits he knew that Lincoln University was established for negroes and the University of Missouri was established for whites (R. 81); yet with this knowledge he nevertheless made application for enrollment as a student in the University of Missouri (R. 82).

The curators of the University of Missouri rejected petitioner's application upon grounds stated in the following resolution, copy of which was by the registrar furnished to petitioner (R. 210, 70-71):

"Whereas, Lloyd L. Gaines, colored, has applied for admission to the School of Law of the University of Missouri, and

"Whereas, the people of Missouri, both in the Constitution and in the Statutes of the State, have

provided for the separate education of white students and negro students, and have thereby in effect forbidden the attendance of a white student in Lincoln University, or a colored student at the University of Missouri, and

"Whereas, the Legislature of the State of Missouri, in response to the demands of the citizens of Missouri, has established at Jefferson City, Missouri, for negroes, a modern and efficient school known as Lincoln University, and has invested the Board of Curators of that institution with full power and authority to establish such departments as may be necessary to offer to students of that institution opportunities equal to those offered at the University, and have further provided, pending the full development of Lincoln University, for the payment, out of the public treasury, of the tuition, at universities in adjacent states, of colored students desiring to take any course of study not being taught at Lincoln University, and

"Whereas, it is the opinion of the Board of Curators that any change in the State system of separate instruction which has been heretofore established, would react to the detriment of both Lincoln University and the University of Missouri,

"Therefore, be it resolved, that the application of said Lloyd L. Gaines, be and it hereby is rejected and denied, and that the Registrar and the Committee on entrance be instructed accordingly."

Senator F. M. McDavid, president of the respondent board of curators, testified that in rejecting petitioner's application the board of curators acted from no other motive or reason than a desire to obey what it conceived to be the mandate of the constitution, the law and the public policy of the state, requiring separation of the races for the purpose of education (R. 175-176); that the board as such has never had any policy on this subject,

and never had any occasion to formulate any policy until petitioner attempted to gain admission; and that when for the first time in the history of the institution a negro (petitioner) applied for admission, the board acted on what it conceived to be its duty under the law (R. 176).

Senator McDavid further testified that the admission of negroes into the University of Missouri would create a great amount of trouble, and would make discipline very difficult; that every student and every citizen knows the traditions of this state and of the university, running through nearly a hundred years, respecting this matter; and that to admit a negro into the University of Missouri would be subversive of discipline, which is a matter of very great importance; and that this feature also was taken into consideration by the board in ruling on petitioner's application (R. 177).

From the circuit court's judgment denying mandamus (R. 53-54) petitioner appealed to the Supreme Court of Missouri (R. 55), which latter court, in an opinion concurred in by all its seven judges, affirmed the judgment (R. 209-224).

SUMMARY OF THE ARGUMENT.

I.

This case does not present a substantial federal question reviewable by this court.

The state court held that the laws of Missouri do not entitle petitioner to be admitted as a student in the University of Missouri, and held that those laws provide for race separation for purposes of higher education (R. 211-216). This construction of the laws of Missouri is binding here.

Senn v. Tile Layers' Protective Union, 301 U. S. 468, 477.

Midland Realty Co. v. Kansas City Power & Light Co., 300 U. S. 109, 113.

Atchison, Topeka & Santa Fe Ry. Co. v. Railroad Commission of California, 283 U. S. 380, 390-1.

Coombes v. Getz, 285 U. S. 434, 441.

Memphis & C. Ry. Co. v. Pace, 282 U. S. 241, 244.

Gregg Dyeing Co. v. Query, 286 U. S. 472, 480.

Roe v. State of Kansas ex rel. Smith, 278 U. S. 191, 193.

Ex Parte Worcester County National Bank, 279 U. S. 347, 359.

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 680.

Hanover Fire Insurance Co. v. Carr, 272 U. S. 494, 509.

Dorchy v. State of Kansas, 272 U. S. 306, 308.

Swiss Oil Corporation v. Shanks, 273 U. S. 407, 411-412.

State of Missouri ex rel. Hurwitz v. North, 271 U. S. 40, 41.

Keith v. Johnson, 271 U. S. 1, 8.

Wadley Southern Ry. Co. v. State of Georgia,
235 U. S. 651, 657-8.

The state court unequivocally held that petitioner is entitled to educational facilities substantially equal to those afforded white citizens (R. 218), but found as a fact that the facilities provided by the state for petitioner are substantially equal to those afforded white students (R. 218-224). This finding of fact is based upon substantial and uncontradicted evidence (R. 109, 113, 114, 117-118, 157-8, 158-9, 160, 161, 162-3); and it is binding here.

Northern Pacific Railway Co. v. North Dakota,
236 U. S. 585, 593.

Thomas v. Texas, 212 U. S. 278, 281.

Grayson v. Harris, 267 U. S. 352, 357.

Aetna Life Ins. Co. v. Dunken, 286 U. S. 389,
393-4.

Waters-Pierce Co. v. Texas Company, 212 U. S.
88, 97.

Willoughby v. Chicago, 235 U. S. 45, 50.

Interstate Amusement Co. v. Albert, 239 U. S.
560, 567.

Petitioner does not, and truthfully cannot, claim that this finding of fact by the state court is unsupported by the evidence.

Petitioner's refusal to avail himself of the educational facilities provided for him by the State of Missouri under the Lincoln University Act (R. 218-219, 222, 74, 82, 83, 84), is an insuperable obstacle to his recovery.

McCabe v. Atchison, Topeka & Santa Fe Ry. Co.,
235 U. S. 151, 163-4.

This case does not fall within Paragraph 5 of Rule 38 of this court, because (a) the state court's decision does

not involve a substantial federal question; (b) the decision is in accord with applicable decisions of this court (*Plessy v. Ferguson*, 163 U. S. 537, 544; *Gong Lum v. Rice*, 275 U. S. 78; 85, 86; *Cumming v. Board of Education*, 175 U. S. 528; *Hall v. DeCuir*, (concurring opinion) 95 U. S. 485, 504-506); and (c) there is no showing of "special and important reasons" for the issuance of certiorari.

II.

The State of Missouri has not denied petitioner the equal protection of the laws by excluding him from the School of Law of the University of Missouri.

Race separation for purposes of education does not infringe the rights of either the white or negro race guaranteed by the Fourteenth Amendment.

Plessy v. Ferguson, 163 U. S. 537, 544.

Gong Lum v. Rice, 275 U. S. 78, 85-86.

Hall v. DeCuir, 95 U. S. 485, 504-506 (concurring opinion).

Lehew v. Brummell, 103 Mo. 546, 551-552.

Younger v. Judah, 111 Mo. 303, 310.

Bertonneau v. Board of Directors, 3 Fed. Cases 294, 296.

Wall v. Oyster, 36 App. D. C. 50, 31 L. R. A. (N. S.) 180, 185.

State ex rel. v. McCann, 21 Ohio 198, 209-211.

McMillan v. School Committee, 107 N. C. 609, 12 S. E. 330, 331.

Loigery v. Board of Trustees, 140 N. C. 33, 52 S. E. 267, 272.

Johnson v. Board of Education, 166 N. C. 468, 82 S. E. 832, 834, 835.

Martin v. Board of Education, (W. Va.) 26 S. E. 348, 349.

Ward v. Flood, 48 Calif. 36, 49-51.

People ex rel. King v. Gallagher, 93 N. Y. 438, 445-447, 455.

People ex rel. Cisco v. School Board, 161 N. Y. 598, 601.

State ex rel. Gumm v. Albritton, 98 Okla. 158, 224 Pac. 511, 513.

People ex rel. Dietz v. Easton, (N. Y.) 13 Abbott's Practice (N. S.) 159, 165.

United States v. Buntin, 10 Fed. 730, 735.

Puitt v. Commissioner, 94 N. C. 709, 718-719.

Social equality is not a legal question, and cannot be enforced by laws or the judgments of courts.

Plessy v. Ferguson, 163 U. S. 537, 551.

State ex rel. Weaver v. Trustees of Ohio State University, 126 Ohio St. 290, 297.

People ex rel. King v. Gallagher, 93 N. Y. 438, 448.

Lehew v. Brummell, 103 Mo. 546, 551-2.

Younger v. Judah, 111 Mo. 303, 311-312.

Martin v. Board of Education, (W. Va.) 26 S. E. 348, 349.

Roberts v. City of Boston, 5 Cush. 198, 210.

Ward v. Flood, 48 Calif. 36.

III.

The facilities for legal education provided for petitioner under the Lincoln University Act (Secs. 9616-9624, R. S. Mo., 1929) are substantially equal to the facilities afforded white students in the School of Law of the University of Missouri.

In separating the races and in determining the particular facilities to be used by each race, the state is allowed a large measure of discretion; and the courts will not interfere with the exercise of that discretion as unconstitutional, except in case of a very clear and unmistakable disregard of constitutional rights.

Plessy v. Ferguson, 163 U. S. 537, 550.

Cumming v. Board of Education, 175 U. S. 528, 545.

Gong Lum v. Rice, 275 U. S. 78, 87.

Lowery v. Board of Trustees, 140 N. C. 33, 52 S. E. 267, 270.

Ward v. Flood, 48 Calif. 36, 54-56.

State ex rel. v. McCann, 21 Ohio. 198, 204-5, 211-12.

People ex rel. King v. Gallagher, 93 N. Y. 438, 456.

People ex rel. Dietz v. Easton, (N. Y.) 13 Abbott's Practice (N. S.) 159, 161-163.

State ex rel. v. Gray, 93 Ind. 303, 306.

The Lincoln University Act (Secs. 9616-9624, R. S. Mo., 1929) provides higher education for the negroes of Missouri "up to the standard furnished at the State University of Missouri"; and provides that pending the full development of Lincoln University, its board of curators shall arrange for the attendance of negro residents of the state at the university of any adjacent state, to take any course of study provided for at the State University of Missouri and which is not taught at Lincoln University, and to pay the full tuition fees for such attendance. The duty to do these things is mandatory.

Lincoln University v. Hackman, 295 Mo. 118, 124.

State ex rel. Gaines v. Canada (R. 219, 221).

Under this act the duty to provide petitioner with a legal education is upon the curators of Lincoln University, and not upon the curators of the University of Missouri. It is the duty of the Lincoln University curators, upon petitioner's request, to establish a school of law in Lincoln University and to admit petitioner as a student therein; and, pending the inauguration of that school, and as a temporary matter, to arrange for his attendance

in one or another of the schools of law already established in the universities of any one of four adjacent states (all of which admit negroes), and to pay his tuition fees in full while he is attending such school.

Substantial equality and not identity of school facilities is what is guaranteed by the Fourteenth Amendment; and the Lincoln University Act provides substantially equal facilities for petitioner.

Gong Lum v. Rice, 275 U. S. 78, 84, 85-86, 87.

Lehew v. Brummell, 103 Mo. 546, 552.

People ex rel. King v. Gallagher, 93 N. Y. 438, 452, 448.

State ex rel. Garnes v. McCann, 21 Ohio St. 198, 211.

State ex rel. Weaver v. Trustees of Ohio State University, 126 Ohio St. 290, 297.

Wong Him v. Callahan, 119 Fed. 381, 382.

Cory v. Carter, 48 Ind. 327, 362, 363.

Ward v. Flood, 48 Calif. 36, 54, 56.

School Dist. v. Hunnicutt, 51 F. (2d) 528.

State ex rel. Gumm v. Albritton, 98 Okla. 158, 224 Pac. 511, 513.

Lowery v. Board of Trustees, 140 N. C. 33, 52 S. E. 267.

Dameron v. Bayliss, (Ariz.) 126 Pac. 273, 275.

Daviess County Board of Educ. v. Johnson, (Ky.) 200 S. W. 313, 315.

State ex rel. v. Board of Education, 7 Ohio Dec. 129.

State ex rel. Dietz v. Easton, (N. Y.) 13 Abbott's Practice (N. S.) 159, 161-162, 165.

United States v. Buntin, 10 Fed. 730, 735-6.

State ex rel. v. Gray, 93 Ind. 303, 306.

People ex rel. Cisco v. School Board, 161 N. Y. 598, 48 L. R. A. 113.

Lincoln University is able, financially and otherwise, to furnish petitioner with the legal education he seeks.

The quality of legal education available to petitioner in any of the universities of adjacent states equals that provided in the School of Law in the University of Missouri.

Petitioner's living expenses while attending law school would be the same whether he attended Lincoln University, the University of Missouri, or any of the state universities of Illinois, Iowa, Nebraska or Kansas (R. 220).

The small difference in travel expense incident to his attendance in any one of the four law schools in adjacent states is a mere matter of inconvenience, which must necessarily arise as an incident to any classification of school system; and furnishes no ground of complaint.

Lehew v. Brummell, 103 Mo. 546, 552.

People ex rel. King v. Gallagher, 93 N. Y. 438, 451-452.

Gong Lum v. Rice, 275 U. S. 78, 84.

Roberts v. City of Boston, (Mass.) 5 Cush. 198, 209-210.

State ex rel. Garnes v. McCann, 21 Ohio St. 109, 204, 211.

Cory v. Carter, 48 Ind. 327, 360-361.

Ward v. Flood, 48 Calif. 36, 42, 52-56.

Dameron v. Bayliss, (Ariz.) 126 Pac. 273, 274.

State ex rel. v. Board of Education, 7 Ohio Dec. 129.

People ex rel. Dietz v. Easton, (N. Y.) 13

Abbott's Practice (N. S.) 159, 161-162, 165.

United States v. Buntin, 10 Fed. 730, 735-6.

Any small difference in travel expense would be more than overcome by the payment by the state of his full tuition fees (Sec. 9622, R. S. Mo., 1929; R. 221-222).

Petitioner has refused to use the school facilities provided for him by the State of Missouri; and his refusal is an insuperable obstacle to his recovery.

McCabe v. Atchison, Topeka & Santa Fe Ry. Co.,
235 U. S. 151, 162-164.

The question as to the constitutionality of the statutory provision for out-of-state instruction is, strictly speaking, not here for review. This because petitioner never made application to the Lincoln University curators for the establishment of a law school; and it is impossible to know whether, if he had applied, a law course would have been immediately established there. Only if Lincoln University had refused or delayed establishment of a law school would the question of the constitutionality of out-of-state instruction arise.

McCabe v. Atchison, Topeka & Santa Fe Ry. Co.,
235 U. S. 151, 162-164.

IV.

The proof offered both by petitioner and by respondents established the fact, and the state Supreme Court expressly found, that the state had afforded petitioner the equal protection of the laws, even though he was excluded from the University of Missouri. This renders immaterial any discussion of the burden of proof.

The burden of proof did not rest upon respondents, but upon petitioner; the settled state rule as to this purely procedural question is that in a mandamus suit the burden is upon the relator to prove that he has a clear legal right to the relief sought; and this burden continues with him throughout.

State ex rel. Jacobsmeyer v. Thatcher, 338 Mo.
622.

State ex rel. Cranfill v. Smith, 330 Mo. 252.

State ex rel. Burnett v. School District of the City of Jefferson, 335 Mo. 803, 812-813.

State ex rel. Buckley v. Thompson, 323 Mo. 248.

Ex parte Ashcraft, 193 Mo. App. 486.

Petitioner's attack upon the credibility of witnesses is entirely unfair, and in each instance is not supported by the record.

Apart from that, petitioner is attacking the credibility of witnesses whom he himself produced, and for whose credibility he vouched.

Dunn v. Dunnaker, 87 Mo. 597.

Cooper v. Armour & Co., 222 Mo. App. 1176.

Choctaw & M. R. Co. v. Newton, (8 C. C. A.) 140 Fed. 225.

V.

Mandamus against respondents was not a proper remedy, because petitioner must exhaust his administrative remedies before seeking extraordinary relief; and this he failed to do.

National Gas Pipe Line Co. of America v. Slatery, 58 Sup. Ct. Rep. 199, 204.

Goldsmith v. United States Board of Tax Appeals, 270 U. S. 117, 123.

Porter v. Investors' Syndicate, 286 U. S. 461.

Peterson Baking Co. v. Bryan, 290 U. S. 570, 575.

Ex parte Virginia Commissioners, 112 U. S. 177.

ARGUMENT.

I.

This case does not present a substantial federal question reviewable by this court.

The Supreme Court of Missouri has ruled against petitioner upon two principal propositions, neither of which involves a substantial federal question.

First. The court has held that the laws of Missouri do not entitle the petitioner to be admitted as a student in the University of Missouri, and has held that those laws provide for the separation of the white and negro races for the purpose of higher education (R. 211-216). This construction of the laws of Missouri by the highest court of that state is binding upon this court (*Senn v. Tile Layers' Protective Union*, 301 U. S. 468, 477; *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U. S. 109, 113; *Atchison, Topeka & Santa Fe Railway Co. v. Railroad Commission of California*, 283 U. S. 380, 390-1; *Coombes v. Getz*, 285 U. S. 434, 441; *Memphis & C. Ry. Co. v. Pace*, 282 U. S. 241, 244; *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 480; *Roe v. State of Kansas ex rel. Smith*, 278 U. S. 191, 193; *Ex Parte Worcester County National Bank*, 279 U. S. 347, 359; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 680; *Hanover Fire Insurance Co. v. Carr*, 272 U. S. 494, 509; *Dorchy v. State of Kansas*, 272 U. S. 306, 308; *Swiss Oil Corporation v. Shanks*, 273 U. S. 407, 411-412; *State of Missouri ex rel. Hurwitz v. North*, 271 U. S. 40, 41; *Keith v. Johnson*, 271 U. S. 1, 8; *Wadley Southern Ry. Co. v. State of Georgia*, 235 U. S. 651, 657-8). Clearly there is no federal question in this part of the state court's decision.

Second. The Supreme Court of Missouri, holding that petitioner is entitled to educational facilities substantially equal to those afforded white citizens (R. 218), has found as a fact that by the facilities for legal education available to petitioner (through the establishment of a law school in Lincoln University if he should ask for it, and, pending that, through out-of-state instruction), petitioner was given the opportunity to receive a legal education equal to that accorded to white students in the University of Missouri (R. 218-224). That court further found as a fact that the facilities available to petitioner through out-of-state instruction, pending the establishment of a law school in Lincoln University, were substantially identical with those offered white students in the University of Missouri, and would have given petitioner, as a prospective Missouri lawyer, as sound, comprehensive and valuable a legal education as is offered white students in the University of Missouri (R. 218-224). These findings of fact (which are not challenged by petitioner) are based upon substantial and uncontradicted evidence showing in much detail the courses offered, the casebooks used, the character, scope and quality of the instruction offered, the relative standing of the schools of law available to petitioner, in comparison with the facilities offered in the University of Missouri and the standing of its school of law (R. 109, 113, 114, 117-118, 157-8, 158-9, 160, 161, 162-3).

It is the settled rule of this court that on certiorari to review a decision of the highest court of a state, this court is bound by the state court's finding as to the facts, unless the petitioner contends and can show that the finding is without evidence to support it, or unless a conclusion of law as to a federal right and the finding of fact are so intermingled as to make it necessary, in order to

pass upon the federal question, to analyze the facts (*Northern Pacific Railway Co. v. North Dakota*, 236 U. S. 585, 593; *Thomas v. Texas*, 212 U. S. 278, 281; *Grayson v. Harris*, 267 U. S. 352, 357; *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389, 393-4; *Waters-Pierce Co. v. Texas Company*, 212 U. S. 88, 97; *Willoughby v. Chicago*, 235 U. S. 45, 50; *Interstate Amusement Co. v. Albert*, 239 U. S. 560, 567). Petitioner makes no claim in his petition or brief that the case at bar falls within either of these two exceptions to the general rule.

Petitioner at page 11 of his brief cites decisions by this court holding that where a federal right is denied, "it is the province of this court to ascertain whether the conclusion of the state court has adequate support in the evidence." That is undoubtedly true "where a federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support" (*Creswill v. Knights of Pythias*, 225 U. S. 246, 261). But petitioner in the instant case does not, and truthfully cannot, claim that the finding of the state court is unsupported by the evidence; therefore the rule he invokes has no application.

None of the other cases cited on this question at page 11 of petitioner's brief in any manner contradicts what we have said above.

So it appears clear that neither of the two parts of the decision by the Supreme Court of Missouri involves a federal question reviewable by this court. The first part of the decision involves merely a construction of state laws. The second part of the decision, fully recognizing petitioner's constitutional right to equal facilities for legal education, finds as a fact that the State has accorded him equal facilities—which finding of fact, supported as it is by strong and uncontradicted evidence, is binding upon this

court. The absence of a substantial federal question is manifest.

If the state Supreme Court had denied that the equal protection clause of the Fourteenth Amendment entitles petitioner to substantially equal facilities for legal education, a wholly different question would have arisen. It could then have been argued with reason by petitioner that a constitutional right or privilege claimed by him under the equal protection clause had been denied. But that situation does not exist. The state Supreme Court held that "there is no question but what negro citizens and taxpayers of Missouri are entitled to school advantages substantially equal to those furnished white citizens of the state" (R. 218). Affirming this principle without equivocation, the court found as a fact that petitioner had been accorded substantially equal opportunity and facilities (R. 218-222).

Independently of the foregoing, there is an insuperable obstacle to petitioner's recovery, in this: Petitioner concededly refused to avail himself of the educational facilities for a legal education provided for him by the State of Missouri. Specifically, he refused to avail himself of his rights under the Lincoln University Act (R. 218-219, 222, 74, 82, 83, 84). If he had applied to the Lincoln University curators for a legal education, it is to be presumed that they would have given it to him in accordance with their mandatory duty under the act. His refusal to avail himself of his legal rights is fatal to his case.

In *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151, 163-4, five negroes sued to restrain the railway companies from making any distinction in sleeping and dining car service on account of race. The negroes' right to equal facilities was conceded

(pages 161-2), but recovery was denied for reasons stated by the court as follows (pages 163-4):

"It is not alleged that any one of the complainants has ever traveled on any one of the five railroads, or has ever requested transportation on any of them; or that any one of the complainants has ever requested that accommodations be furnished to him in any sleeping cars, dining cars or chair cars; or that any of these five companies has ever notified any one of these complainants that such accommodations would not be furnished to him, when furnished to others, upon reasonable request and payment of the customary charge. Nor is there anything to show that in case any of these complainants offers himself as a passenger on any of these roads and is refused accommodations equal to those afforded to others on a like journey, he will not have an adequate remedy at law. The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks. The bill is wholly destitute of any sufficient grounds for injunction and unless we are to ignore settled principles governing equitable relief, the decree must be affirmed."*

This case clearly does not fall within Paragraph 5 of Rule 38 of this court, defining the character of reasons which will be considered by this court in determining whether it will grant certiorari to review state court decisions. This, because (a) the Missouri Supreme Court's decision does not involve a substantial federal question; (b) the decision is in accord with applicable decisions of this court (*Plessy v. Ferguson*, 163 U. S. 537, 544; *Gong Lum v. Rice*, 275 U. S. 78,

*All italics in quotations are ours.

85, 86; *Cumming v. Board of Education*, 175 U. S. 528; *Hall v. DeCuir*, (concurring opinion) 95 U. S. 485, 504-506); and (c) there is no showing of "special and important reasons" for the issuance of certiorari.

Petitioner attempts to make a showing of "special and important reasons" by claiming conflict between the decision in this case and the decision in *Pearson v. Murray*, 169 Md. 478, 182 Atl. 570, 103 A. L. R. 706. But the claimed conflict does not exist, for reasons clearly pointed out by the Missouri Supreme Court (R. 222-224).

Petitioner in effect asks this court to write a declaratory judgment for the purpose of "establishing a standard of conduct" in other states than Missouri. We cannot understand how the alleged need for the establishment of a standard of conduct in other states, where the facts and statutes are not the same, could afford any "special and important" reason for the issuance of certiorari in this Missouri case.

Petitioner says (page 4 of his Petition for Certiorari) that he "challenged the Lincoln University Act as a denial of his federal right to equal protection." This is not true. In his petition for mandamus (R. 2-11) petitioner did not attack the constitutionality of the Lincoln University Act.

For these reasons we respectfully submit that this case does not involve a substantial federal question reviewable by this court.

II.

The State of Missouri has not denied petitioner the equal protection of the laws by excluding him from the School of Law of the University of Missouri.

It is, in effect, now conceded by petitioner that the laws of Missouri do not entitle a negro to admission as a

student in the University of Missouri, and that those laws provide for separation of the white and negro races for the purpose of higher education. The Missouri Supreme Court has so construed and applied the laws of that state (R. 211-216). That construction is controlling here (see cases cited under last previous section of this argument).

It must also be conceded by petitioner that separation of the white and negro races for purposes of education—the exclusion of members of each race from schools provided for the other race—does not infringe the rights of either race guaranteed by the Fourteenth Amendment. In *Plessy v. Ferguson*, 163 U. S. 537, 544, this court in speaking of race separation said:

"Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."

In *Gong Lum v. Rice*, 275 U. S. 78, 85-86, this court said:

"The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black. Were this a new question, it would call for very full argument and consideration, but we think that

it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution" (citing many cases).

To the same effect see the concurring opinion in *Hall v. DeCuir*, 95 U. S. 485, 504-506.

In *Lehew v. Brummell*, 103 Mo. 546, 551-552, a leading case, cited with approval by this court in the *Plessy* and *Gong Lum Cases*, *supra*, the Missouri Supreme Court said:

"But it will be said the classification now in question is one based on color, and so it is; but the color carries with it natural race peculiarities which furnish the reason for the classification. There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated. These differences create different social relations recognized by all well-organized governments. If we cast aside chimerical theories and look to practical results, it seems to us it must be conceded that separate schools for colored children is a regulation to their great advantage."

* * * * *

"The fact that the two races are separated for the purpose of receiving instruction deprives neither of any rights. It is but a reasonable regulation of the exercise of the right. As said in the case just cited, 'Equality and not identity of privileges and rights is what is guaranteed to the citizen.' Our conclusion is that the constitution and laws of this state providing for separate schools for colored children are not forbidden by, or in conflict with, the Fourteenth Amendment of the Federal Constitution; and the courts of last resort in several states have reached the same result" (citing cases).

To the same effect are the following decisions:

- Younger v. Judah*, 111 Mo. 303, 310;
Bertonneau v. Board of Directors, 3 Fed. Cases 294, 296.
Wall v. Oyster, 36 App. D. C. 50, 31 L. R. A. (N. S.) 180, 185.
State ex rel. v. McCann, 21 Ohio 198, 209-211.
McMillan v. School Committee, 107 N. C. 609, 12 S. E. 330, 331.
Lowery v. Board of Trustees, 140 N. C. 33, 52 S. E. 267, 272.
Johnson v. Board of Education, 166 N. C. 468, 82 S. E. 832, 834, 835.
Martin v. Board of Education, (W. Va.) 26 S. E. 348, 349.
Ward v. Flood, 48 Calif. 36, 49-51.
People ex rel. King v. Gallagher, 93 N. Y. 438, 445-447, 455.
People ex rel. Cisco v. School Board, 161 N. Y. 598, 601.
State ex rel. Gumm v. Albritton, 98 Okla. 158, 224 Pac. 511, 513.
People ex rel. Dietz v. Easton, (N. Y.) 13 Abbott's Practice (N. S.) 159, 165.
United States v. Buntin, 10 Fed. 730, 735.
Puitt v. Commissioners, 94 N. C. 709, 718-719.

SOCIAL EQUALITY IS NOT A LEGAL QUESTION.

Petitioner's true attitude is quite clearly shown by the fact that in a deposition taken before trial he was asked whether, if a good law school were established at Lincoln University on a par with the one at the University of Missouri, he would attend it; and on the advice of counsel he refused to answer this entirely reasonable question (R. 88-89). This leads to the reasonable inference that what petitioner really wants is not equal

educational facilities so much as *social equality*. This may be inferred also from petitioner's brief wherein he advances an argument which, in substance and effect, is an argument for social equality of the races. With regard to this point it is sufficient to say that it is uniformly held by the courts in dealing with the question of race separation, that *social equality is not a legal question* and cannot be settled by law or by the judgments of courts.

In *Plessy v. Ferguson*, 163 U. S. 537, 551, this court said:

"The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality it must be the result of natural affinities, mutual appreciation of each other's merits, and a voluntary consent of individuals."

In *State ex rel. Weaver v. Trustees of Ohio State University*, 126 Ohio St. 290, 297, the court said:

"The relief that the relator seeks in this suit is such as to compel the respondents to grant her, not equal school advantages, but the same social intercourse. *The purely social relations of our citizens cannot be enforced by law; nor were they intended to be regulated by our own laws, or by the state and federal constitutions*" (citing many cases).

To the same effect are the following decisions:

People ex rel. King v. Gallagher, 93 N. Y. 438, 448.

Lehew v. Brummell, 103 Mo. 546, 551-2.

Younger v. Judah, 111 Mo. 303, 311-312.

Martin v. Board of Education, (W. Va.) 26 S. E. 348, 349.

Roberts v. City of Boston, 5 Cush. 198, 210.

Ward v. Flood, 48 Calif. 36.

III.

The facilities for legal education available to petitioner under the Lincoln University Act (Secs. 9616 to 9624, R. S. Mo., 1929) are substantially equal to the facilities afforded white students in the School of Law of the University of Missouri.

The State of Missouri has set up a complete and exclusive scheme and plan for the higher education of those qualified negroes who desire it. This plan affords the petitioner that equal opportunity which the Fourteenth Amendment guarantees. In separating the races, and in determining the particular facilities to be used by the two races, the state is allowed a large measure of discretion; and the courts will not interfere with the exercise of that discretion as unconstitutional, except in case of a very clear and unmistakable disregard of rights secured by the Constitution of the United States.

In *Plessy v. Ferguson*, 163 U. S. 537, 550, a statute of Louisiana requiring separate accommodations on railroad trains for the white and colored races, and forbidding any person to occupy a seat in coaches other than the ones assigned to the race to which he belonged, was held not in conflict with the Fourteenth Amendment. In the course of the opinion this court said:

"So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of

the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."

In *Cumming v. Board of Education*, 175 U. S. 528, 545, this court said:

"We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

To the same effect is the decision in *Gong Lum v. Rice*, 275 U. S. 78, 87.

In *Lowery v. Board of Trustees*, 140 N. C. 33, 52 S. E. 267, 270, the North Carolina court in dealing with a case involving race separation for educational purposes said:

"This court would be reluctant to declare invalid an act establishing a public school, when it had received the sanction of the people directly and locally interested, unless it was manifest that these principles were violated. Much must be left to the good faith, integrity and judgment of local boards in working out the difficult problems of providing equal facilities for each race in the education of all the children of the state. Local conditions, relative numbers, and other well-recognized factors enter into the problem, and must be dealt with in a spirit of justice to all concerned, and to promote the honor and welfare of the state."

In *Ward v. Flood*, 48 Calif. 36, 54-56, a case dealing with the question of race separation for purposes of education, the California court applied the principle that a large discretion is vested in the school authorities, and in this connection quoted, with approval the following language from a Massachusetts case:

"In the absence of special legislation on this subject, the law has vested the power in the committee to regulate the system of distribution and classification; and *when this power is reasonably exercised, without being abused or perverted by colorable pretences, the decision of the committee must be deemed conclusive.*"

The same principle is announced in the following decisions:

State ex rel. v. McCann, 21 Ohio 198, 204-5, 211-12.

People ex rel. King v. Gallagher, 93 N. Y. 438, 456.

People ex rel. Dietz v. Easton, (N. Y.) 13. Abbott's Practice (N. S.) 159, 161-163.

State ex rel. v. Gray, 93 Ind. 303, 306.

THE LINCOLN UNIVERSITY ACT.

The Lincoln University Act of 1921 (Secs. 9616 to 9624, R. S. Mo., 1929) provides higher education for the negroes of Missouri "up to the standard furnished at the State University of Missouri." The control of Lincoln University is vested in a board of curators consisting of the state superintendent of instruction and six other members, at least three of whom shall be negroes. The Lincoln University curators are required to organize after the manner of the board of curators of the state university, *with the same powers, authority, responsibilities, privileges, immunities, liabilities and compensation as*

those prescribed for the board of curators of the University of Missouri (Sec. 9621, R. S. Mo., 1929).

Section 9618 provides:

"The board of curators of the Lincoln University shall be authorized and required to reorganize said institution so that it shall afford to the negro people of the state opportunity for training up to the standard furnished at the State University of Missouri whenever necessary and practicable in their opinion. To this end the board of curators shall be authorized to purchase necessary additional land, erect necessary additional buildings, to provide necessary additional equipment, and to locate, in the County of Cole, the respective units of the university where, in their opinion, the various schools will most effectively promote the purposes of this article."

The legislature, realizing that as a practical matter the full development of Lincoln University could not be accomplished instantaneously, and that in the interim negro students should be accorded the same opportunity for higher education as that accorded to white students at the University of Missouri, provided for this in a practical and eminently fair manner. Section 9622, R. S. Mo., 1929, provides:

"Pending the full development of the Lincoln University, the board of curators shall have the authority to arrange for the attendance of negro residents of the State of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at the Lincoln University and to pay the reasonable tuition fees for such attendance; provided that whenever the board of curators deem it advisable, they shall have the power to open any necessary school or department."

The duties imposed upon the Lincoln University curators by the Lincoln University Act (Secs. 9616 to 9624, R. S. Mo., 1929) have been held by the Missouri Supreme Court to be *mandatory*, to the end that the negroes of the State shall have an opportunity for university education equal to that afforded by the University of Missouri. In *Lincoln University v. Hackmann*, 295 Mo. 118, 124, the court said:

"By the act in question a great educational institution was organized as a university separate and apart from the state university, for the purpose of affording the negroes of our state the means and facilities of higher education. The board of curators was clothed with the powers conferred by statute on the curators of our state university, and authorized to purchase land and erect additional buildings, etc. These duties are affected with a public trust. The statute in this respect may be said to be *mandatory in its nature* in order that its great beneficent purposes may be carried into effect and the state realize the benefits of *extending to the negroes of our state the education, culture and training afforded by the University of Missouri.*"

Under this controlling interpretation of the statute, reaffirmed in the instant case (R. 219, 221), the Lincoln University board of curators are not merely authorized, but are *required*, to reorganize the institution so that it shall afford opportunity to negroes equal to that accorded to white students. And, pending the full development of Lincoln University, the Lincoln University board of curators are not merely authorized, but are *required*, to arrange for the attendance of negro residents of the state at the university of any adjacent state, to take any course of study provided at the University of Missouri but not at Lincoln University; and they are not merely authorized, but are *required*, to pay the reasonable

tuition fees for such attendance (Sec. 9622, R. S. Mo., 1929): *The duty to do these things is mandatory and peremptory.*

At two different places in his brief (pages 2, 12) petitioner says the Lincoln University Act required Lincoln University to be reorganized so that it "might" afford negro citizens of the state opportunity for training equal to that afforded at the University of Missouri. This is an understatement; the statute uses the more positive words "*shall afford*" (Sec. 9618).

From the foregoing statutory provisions two conclusions irresistibly follow:

1. A complete and exclusive scheme and plan for the higher education of the negroes of the state has been formulated, and is in actual operation.

2. The responsibility and duty to carry out this scheme and plan has been placed by law—not upon these respondents, the curators of the *University of Missouri*—but upon the curators of *Lincoln University*.

The petitioner says he wants an education in the law. He is unquestionably entitled to it. The State of Missouri has made provision for him to receive such education, and has plainly marked out the course for him to pursue in order to get it. The agency of the state to whom he should (under the statute) apply is the agency specifically charged with the mandatory duty to furnish him what he seeks. It is the agency to whom the state has entrusted the authority and power, and upon whom the state has imposed the mandatory duty, to provide 'he negroes of the state with higher education. That agency is the board of curators of Lincoln University. It is not the present respondents, the board of curators of the University of Missouri.

Under this statutory scheme and plan, if and when petitioner pursues his legal rights and makes application to the Lincoln University curators for an education in the law, it will then become the mandatory duty of these curators (a) to establish a school of law in Lincoln University and to admit petitioner as a student therein; and (b) pending that, and as a temporary matter, to arrange for the attendance of petitioner in one or another of the schools of law already established in the Universities of Kansas, Nebraska, Iowa or Illinois (all of which admit negroes), and to pay his tuition fees while he is attending such school.

SUBSTANTIAL EQUALITY AND NOT IDENTITY OF SCHOOL FACILITIES IS WHAT IS GUARANTEED BY THE FOURTEENTH AMENDMENT.

The essential thing petitioner seeks is a legal education. The State of Missouri has provided that he shall have it. There is provided for him the opportunity, to be freely had for the asking, to receive through the curators of Lincoln University an education in the law, equal in all substantial respects to that provided in the Missouri University Law School.

Petitioner's whole case is based upon the erroneous assumption that he is constitutionally entitled to a legal education at a particular place, or in a particular school. This assumption is entirely unfounded. The Fourteenth Amendment no more gives petitioner the right to attend the University of Missouri than it gives a white student the right to attend Lincoln University. The equal protection clause of the Fourteenth Amendment goes no further than to require that the facilities for education afforded each race shall be substantially equal. The thing required is not that the facilities for negro students be identical (in the very same schools and class rooms), but that they shall be substantially equal to the facilities

offered to white students. The dec. in the instant case clearly recognizes and applies this principle (R. 218).

Petitioner contends (page 18 of Brief) that he is constitutionally entitled to what he is pleased to call the "diploma value" of an education in the University of Missouri. It is a naive conception of the value of an education, that its worth is to be attested by a "diploma" from a particular place. There is not a scintilla of evidence in this case that a legal education at the University of Missouri has a "diploma value." The evidence in this case overwhelmingly proves that the opportunity afforded to petitioner to receive a legal education was equal to that afforded to students at the University of Missouri (R. 218-224, 99, 100, 109, 113, 114, 117-118, 157-8, 158-9, 160, 161, 162-3).

Even if there were a "diploma value" in having attended the University of Missouri, no particular citizen of Missouri is entitled to the right to receive his opportunity for an education at *that particular place*. The State of Missouri may make reasonable regulations as to the system of education which it shall maintain for its citizens, and separation of the races is a reasonable incident to this regulation. Petitioner has received his college education at Lincoln University, and he admits that the opportunity thus afforded to him was fully as good as the opportunity afforded at the University of Missouri (R. 79-80, 80-81). The State of Missouri will furnish him a legal education at Lincoln University if he requests it; and when this equal opportunity has been provided for petitioner, there is no basis for a claim by him that this opportunity should have been afforded to him at another and different place. The State of Missouri cannot be required to afford equal opportunity for an education to each citizen in *the particular place* where each citizen thinks a tenuous "diploma value" exists.

The decision below (citing and following *Plessy v. Ferguson*, 163 U. S. 537, 544, and *Gong Lum v. Rice*, 275 U. S. 78, 84) holds that "equality and not identity of school advantages is what the law guarantees to every citizen, white or black" (R. 217-218). The court holds that the statutory provision made for the benefit of petitioner—(that he may receive a legal education in a school of law to be established in Lincoln University, and, pending that, in one or another of the schools of law already established in the universities of adjacent states)—gives petitioner substantially equal facilities for legal education, and satisfies the provisions of the equal protection clause of the Fourteenth Amendment.

In *Gong Lum v. Rice*, 275 U. S. 78, 84, a Chinese child nine years old, who lived in the Rosedale Consolidated High School District, Bolivar County, Mississippi, was by the school authorities refused the right to attend the school provided for white children in that district. It was not denied that a school for colored children located in another district was open to her. This court held that the Chinese child was not denied the equal protection of the laws by being classed among the colored races assigned to such separate school in the outside district. In that connection this court said:

"We must assume then that there are school districts for colored children in Bolivar County, but that no colored school is within the limits of the Rosedale Consolidated High School District. This is not inconsistent, with there being, at a place outside of that district and in a different district, a colored school which the plaintiff, Martha Lum, may conveniently attend. If so, she is not denied, under the existing school system, the right to attend and enjoy the privileges of a common school education in a colored school."

At pages 85-86 the court said:

"The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black. Were this a new question, it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution."

At page 87 the court said:

"The decision is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment. The judgment of the Supreme Court of Mississippi is affirmed."

We respectfully submit that the Gong Lum case is decisive here. Petitioner contends (page 11 of Brief) that that case leaves the question of equal protection "open for consideration by the court where an express claim is made that petitioner has been excluded from the only public institution available, solely because of race or color." In fact what this court said was this (page 84):

"Had the petition alleged specifically that there was no colored school in Martha Lum's neighborhood to which she could conveniently go, a different question would have been presented, and this, without regard to the state Supreme Court's construction of the state constitution as limiting the white schools provided for the education of children of the white or Caucasian race."

If the availability of a colored school in an outside district afforded substantially equal facilities to a nine-year-old child, we submit that the provision in the Missouri statute for the establishment of a law school for petitioner in Lincoln University, and, pending that, provision for his attendance, with full tuition paid, at any one of four excellent law schools located in adjacent states, only 174, 209, 319 or 468 miles away from his home (R. 152), certainly afforded substantially equal facilities to petitioner, a mature man (R. 57). In the Gong Lum case the nine-year-old child would have had to go to and from the school in the outside district every school day, while petitioner would have had to travel to and from law school (whether at Lincoln University or out-of-state) only two or three times a year; so that the inconvenience in the facilities provided for petitioner was actually much less than the inconvenience in the facilities provided for the nine-year-old Chinese child in the Gong Lum case.

In *Lehew v. Brummell*, 103 Mo. 546, 552, suit was brought to enjoin the children of Brummell, a negro, from attending a white school located in the district where the negro children resided. Brummell's children were the only colored children of school age residing in that district. There was no colored school in that district. There was a colored school located in another district, but it was located at a greater distance from Brummell's home than was the white school. There was squarely presented for decision the question as to the constitutionality of the laws of Missouri, which provide for the education of colored children in separate schools located in a different district from that in which the colored children reside. The court held that these laws do not violate the equal protection clause of the Fourteenth Amendment. The court said:

"The fact must be kept in mind, for it lies at the foundation of this controversy, that the laws of this state do not exclude colored children from the public schools. Such children have all the school advantages and privileges that are afforded white children. The fact that the two races are separated for the purpose of receiving instruction deprives neither of any rights. It is but a reasonable regulation of the exercise of the right. As said in the case just cited, '*Equality and not identity of privileges and rights is what is guaranteed to the citizen.*' Our conclusion is that the constitution and laws of this state providing for separate schools for colored children are not forbidden by, or in conflict with, the Fourteenth Amendment of the Federal Constitution; and the courts of last resort in several states have reached the same result."

In *People ex rel. King v. Gallagher*, 93 N. Y. 438, a colored girl brought suit in mandamus to compel the principal of a white school to admit her as a student. A separate school was provided by the school authorities for colored persons, in accordance with statutory provisions. The colored school was located at a greater distance from the relator's residence than was the white school; but the court held that this was a mere incident to any classification of pupils, and that it afforded no substantial ground of complaint. At page 452 of the opinion the court said:

"It is quite impracticable for the authorities to take into account and provide for the gratification of the taste, or even the convenience of the individual citizen in respect to the place or conditions under which he shall receive an education. In the nature of things one pupil must always travel further to reach a fixed place of instruction than another, and so too the resident of one district is frequently required to go further to reach the school established

in his own district than a school in an adjoining district, but these are inconveniences incident to any system, and cannot be avoided. It is only when he can show that he is deprived of some substantial right which is accorded to other citizens and denied to him that he can successfully claim that his legal rights have been invaded."

At page 448 of the opinion the court said:

"When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it is organized and performed all of the functions respecting social advantages with which it is endowed. The design of the common-school system of this State is to instruct the citizen, and where, for this purpose, they have placed within his reach equal means of acquiring an education with other persons, they have discharged their duty to him and he has received all that he is entitled to ask of the government with respect to such privileges."

In *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, 211, the plaintiff, a colored man, sued in mandamus to compel the school authorities to admit his three children to the privileges of a white school, which was the only public school in subdistrict No. 9, where plaintiff resided. The township board had formed a joint district composed of Subdistrict 9 and an adjoining district and established a school in the joint district for the education of colored children, which afforded facilities equal to those of the white school in subdistrict No. 9. The plaintiff attacked this arrangement as a denial to him and his children of the equal protection of the laws, in violation of the Fourteenth Amendment. The Ohio court refused mandamus, and held:

"The plaintiff, then, cannot claim that his privileges are abridged on the ground of inequality of school advantages for his children. Nor can he dictate where his children shall be instructed, or what teacher shall perform that office, without obtaining privileges not enjoyed by white citizens. *Equality of rights does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school. Any classification which preserves substantially equal school advantages is not prohibited by either the state or Federal Constitution, nor would it contravene the privileges of either.* There is, then, no ground upon which the plaintiff can claim that his rights under the Fourteenth Amendment have been infringed."

In *State ex rel. Weaver v. Trustees of Ohio State University*, 126 Ohio St. 290, the relator, Doris Weaver, sued in mandamus to compel the university authorities to admit her to a certain course in home economics and to residence in the "home management house" as the same was usually conducted. The relator was a colored girl and a senior student in the school of home economics. As a part of this course the students resided for a certain period in the "home management house" and carried the responsibility of homemaking under conditions approximating those of a modern home. The relator was denied admission to this home management house because "it has never been the policy of the Ohio State University to require students of different races or nationalities to reside together as part of a single family." The relator was the only girl of her race who had matriculated and become qualified to take the course; and by reason thereof the defendants had prepared quarters for relator, having the

same facilities as were furnished to students of the white race enrolled for such course of study. The Ohio court held that this arrangement did not infringe relator's constitutional right to the equal protection of the laws, and constituted no violation of the Fourteenth Amendment, and in this connection said (l. c. 297):

"The relator has been denied no educational advantages or privileges that are not similarly used and enjoyed by other students; nor has she been denied the privilege of taking her degree, should she consent to occupy available space in the home economics house. On page 211, in the Ohio case, *Garnes v. McCann*, *supra*, the learned judge said, 'Any classification which preserves substantially equal school advantages is not prohibited by either the state or Federal Constitution, nor would it contravene the privileges of either.'"

In *Wong Him v. Callahan*, 119 Fed. 381, 382, the complainant, a Chinese citizen of the United States, brought suit to compel the school authorities to admit him into a white school. A statute of California provided separate schools for Chinese. The question was presented whether complainant's rights under the equal protection clause of the Fourteenth Amendment were infringed. The court said:

"Concerning the authority of the state over matters pertaining to public schools within its limits, and the validity of legislation of the character of that under consideration, it is well settled that the state has the right to provide separate schools for the children of different races, and such action is not forbidden by the Fourteenth Amendment to the Constitution, provided the schools so established make no discrimination in the educational facilities which they afford. When the schools are conducted under the same general rules, and the course of study is the

same in one school as in the other, it cannot be said that pupils in either are deprived of the equal protection of the law in the matter of receiving an education."

Other decisions upholding the constitutionality of provisions for separate education of the races, similar to those involved in the case at bar, are the following:

Cory v. Carter, 48 Ind. 327, 362, 363.

Ward v. Flood, 48 Calif. 36, 54, 56.

School Dist. v. Hunnicutt, 51 F. (2d) 528.

State ex rel. Gumm v. Albritton, 98 Okla. 158, 224 Pac. 511, 513.

Lowery v. Board of Trustees, 140 N. C. 33, 52 S. E. 267.

Dameron v. Bayliss, (Ariz.) 126 Pac. 273, 275.

Daviess County Board of Educ. v. Johnson, (Ky.) 200 S. W. 313, 315.

State ex rel. v. Board of Education, 7 Ohio Dec. 129.

State ex rel. Dietz v. Easton, (N. Y.) 13 Abbott's Practice (N. S.) 159, 161-162, 165.

United States v. Buntin, 10 Fed. 739, 735-6.

State ex rel. v. Gray, 93 Ind. 303, 306.

People ex rel. Cisco v. School Board, 11 N. Y. 598, 48 L. R. A. 113.

LINCOLN UNIVERSITY'S ABILITY TO FURNISH PETITIONER A LEGAL EDUCATION.

In his brief petitioner contemptuously refers to the Lincoln University Act as, in effect, mere camouflage not backed up by anything substantial. The implication is utterly false. The State of Missouri is a pioneer in the field of higher education for negroes, and is the only state in the Union which has established a separate university for negroes on the same basis as the state university for white students (R. 138). The state legisla-

ture has always given Lincoln University substantially all the money requested by its board (R. 137), and from 1921 to 1935 appropriated \$3,477,153.49, from which \$500,000.00 was eliminated by the decision in *Lincoln University v. Hackmann*, 295 Mo. 118, leaving the net balance appropriated in those years \$2,977,153.49 (R. 149-150). The State of Missouri has dealt generously in providing for the higher education of the negro.

Petitioner says in his brief (page 13) that Lincoln University has no definite program of expansion. This is a misleading statement. In fact, the president of its board testified as follows (R. 130):

"At the present time we are making a very careful survey of negro education in Missouri to determine what Lincoln University should do for its people, that it is not now doing, and on the basis of that we shall formulate a definite program of expansion."

Petitioner says in his brief (page 13) that Lincoln University was facing the prospect of ending up the biennium with a small deficit. In fact, this was a deficit of only \$3,000.00, not in the fund for general operation, but in a special building fund, due to unexpected labor trouble in the erection of a building (R. 135, 136). Petitioner ignores the fact that at the time he applied for admission in the University of Missouri, the unexpended balances in the Lincoln University funds aggregated \$311,061.74, a substantial part of which funds were available for operation and general expense (R. 147, and see Laws Mo., 1935, page 66), and that if petitioner had applied for a legal education under the Lincoln University Act, the funds were therefore ample to have covered his needs. In speaking of the institution winding up, with a

small deficit at the end of the biennium, relator is stressing a fact which is immaterial. Many state institutions wind up with small deficits at the end of a biennial period, yet they continue to function as going concerns nevertheless. Indeed, the United States Government for seven or eight years past has wound up each year with a very substantial deficit, yet it is still a going concern and its bonds command a premium in the financial markets of the world.

Petitioner argues that Lincoln University has not so far included a law department. *But there has never been any demand upon Lincoln University for a legal education by any negro* (R. 222, 136-137). The petitioner himself has never made any such demand (R. 222, 218-219, 85-86, 136-137). So there is good reason for not having established a school of law up to this time. As indicating the good faith of the state and of the Lincoln University curators, the facts are that prior to the institution of this suit the Lincoln University curators were making a complete survey of the whole subject of negro education, on the basis of which a definite program of expansion was planned (R. 130). The history of the development of Lincoln University, from a modest beginning to what is now one of the leading negro universities in the nation, is cogent evidence that the State of Missouri has generously responded to its full responsibility for the higher education of the negro race. The Lincoln University Act has imposed upon the Lincoln University curators the mandatory duty to establish a school of law in Lincoln University when the need for it exists. In the light of past expansion of the institution to meet the growing needs of the negro in the field of higher education, it is to be reasonably presumed that the state will, in good faith, continue to fulfill its obligation.

It ill becomes petitioner to complain of the absence of a law department in Lincoln University, when he admits that he never informed anyone connected with Lincoln University that he ever desired a legal education. When he was advised of his right to apply to that institution, he chose to ignore the rights which the State of Missouri had afforded him, and voluntarily followed a course of action which can accomplish no other result than merely to delay his legal education (R. 74, 82, 83, 84, 218-219).

Petitioner in his brief (pages 22-23) in effect argues that a request that the Lincoln University curators furnish him with a legal education would have been a vain and useless thing. *There is nothing in this record justifying any such suggestion.* If on the date when petitioner applied for admission into the University of Missouri petitioner had instead applied to the Lincoln University curators, it would have been the duty of those curators (and the law presumes they would have performed the duty) to establish a law school in Lincoln University, and, pending that, to arrange for petitioner's attendance in the law school of any one of four adjacent state universities which he might select, and to pay his tuition fees while so attending such law school. Moreover, on that very date, as above pointed out, Lincoln University had on hand in unexpended funds \$311,061.74 (R. 147). The undisputed evidence shows that a law school in Lincoln University could be established and operated, on a level of scholarship and training equal to that at the University of Missouri, for a maximum of \$10,000.00 per year (R. 185-186). And on every day petitioner applied for admission in the University of Missouri there was in the special tuition fund, in charge of the state superintendent of schools, the additional sum of \$6,351.18, available for payment of out-of-state tuitions

for negroes (R. 220-221, 165). These undisputed facts, shown by this record, utterly destroy petitioner's contention that a demand on the Lincoln University curators would have been useless.

Petitioner argues in his brief (page 23) that no means were available to open a law school in Lincoln University. This statement is unsupported by the record. Petitioner ignores the fact that in 1935—although it would cost a maximum of only \$10,000.00 per year to establish and maintain a law department in Lincoln University (R. 185-186)—\$212,000.00 was appropriated for salaries of executive officials, professors and instructors, etc., and \$80,000.00 was appropriated for operation and general expense of Lincoln University (Laws Mo., 1935, page 66). Petitioner also ignores the fact that at the time he applied for admission as a student in the University of Missouri the unexpended balance in the former appropriation was \$138,684.63, and the unexpended balance in the latter appropriation was \$56,433.75 (R. 147). Obviously there was ample money available for the expansion of Lincoln University by the establishment of a law school, if the demand therefor had been made by petitioner.

This answers petitioner's statement (page 3 of Brief) that no appropriation has been made to enable Lincoln University to offer professional or graduate courses. The fact of the matter is that either of the above funds was available for that purpose, if there ever had been a demand for any professional or graduate course by any negro citizen of the state. The appropriations for salaries of professors and instructors were general in form, and were available for law professors and instructors, if needed (see appropriation acts copied in appendix).

The expansion of the teaching staff in Lincoln University is conclusively shown by the steady increase in the appropriations for salaries. The amounts appropriated for salaries from 1921 to 1935 were as follows (see appropriation acts copied in appendix):

1921	\$ 80,000.00
1923	124,946.41
1925	154,000.00
1927	175,000.00
1929	180,000.00
1931	200,000.00
1933	200,000.00
1935	212,000.00

That marked expansion has occurred is obvious from the fact that salary appropriations have nearly tripled within fourteen years.

At page 13 of his brief petitioner says that "no serious argument was made at the trial that Lincoln University either could or would inaugurate a law course for the benefit of petitioner, the only applicant." This is a grossly erroneous statement, wholly unsupported by the record. By respondents' return to the alternative writ of mandamus they specifically alleged petitioner's duty to apply to the Lincoln University curators for a legal education if he desired it, alleged the duty of such curators to establish a law department in Lincoln University, and the availability of sufficient funds (R. 36-39).

While the record does not show the oral arguments at the trial, petitioner has no basis in fact for his assertion that the same point was not seriously pressed in argument—the true fact being that it was vigorously pressed. Petitioner also makes a misstatement when he refers to himself as "the only applicant" for a law course

in Lincoln University. The fact is that petitioner refused to become an applicant for such a course at Lincoln University (R. 218-219, 222, 74, 82, 83, 84).

While it is true, as petitioner says (pages 13-14 of Brief), that the Lincoln University officials in correspondence with petitioner referred him to the scholarship provisions of the Lincoln University Act (R. 72-73), this was obviously the appropriate thing for them to do, in view of the fact that when petitioner applied for admission to Missouri University (R. 62-63), the opening of the September semester at Lincoln University was almost at hand, leaving insufficient time to open a law school in that institution at that semester. In these circumstances it was the Lincoln University officials' duty to furnish petitioner out-of-state instruction until a law school in Lincoln University could be established (Sec. 9622, R. S. Mo., 1929). The fact that they did not thereafter establish a law school for petitioner was because no one, not even petitioner, ever requested legal instruction there; and in fact petitioner four days later definitely indicated his refusal to avail himself of any of his rights under the Lincoln University Act (R. 65-66, 67). It would have been futile for the curators of Lincoln University to have established a law school in that institution until at least one student had expressed a desire to receive legal instruction there.

As to money available for the payment of out-of-state tuitions. The Lincoln University Act provided that the Lincoln University curators should pay the tuition fees; and it was this statute which established the right of relator to full tuition (Sec. 9622, R. S. Mo., 1929). Under the well-settled law the provisions of this general act, creating the right to full tuitions, could not be amended or affected by the terms of the subsequent appropriation acts (Laws Mo., 1929, p. 61; Laws Mo., 1931, p. 28; Laws

Mo., 1933, pp. 9, 87; Laws Mo., 1935, p. 113), the latter two of which purported to limit payment of tuition fees to the difference between the amounts respectively charged out of state and at the University of Missouri (*State ex rel. Davis v. Smith*, 335 Mo. 1069; *State ex rel. Hueller v. Thompson*, 316 Mo. 272; *State ex rel. Tolerton v. Gordon*, 236 Mo. 142). It therefore results, as the Missouri Supreme Court held (R. 221), that all of the money appropriated for tuition fees was available for the payment of full tuitions, in accordance with the provisions of the Lincoln University Act, *supra*. Petitioner's statement (page 13 of Brief) that "no money was appropriated for scholarships until 1929," is immaterial because petitioner was not ready to take a legal education until 1935 (R. 57-58).

Petitioner says in his brief (page 14) that only one negro law student could be found in the adjacent state universities, and only three negro lawyers had been admitted to the Missouri bar within the past five years—which inferentially suggests that petitioner is now for the first time contending that there are not enough Missouri negro residents desiring to study law to justify the expenditure of the money necessary to create a law department at Lincoln University. In making this contention, petitioner overlooks his own contention, vigorously presented below (R. 230), that petitioner's right to receive a legal education is "individual," and "cannot be made to depend on how many or how few negroes apply to the State for a legal education." It is the individual who is entitled to receive the equal protection of the laws, and if one qualified negro is denied the establishment of a law school by the Lincoln University curators, he may properly claim that his constitutional privilege has been invaded (*McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151, 160), and by mandamus

may compel those curators to establish a law school in that institution (*Cumming v. Richmond County Board of Education*, 175 U. S. 528, 545). In this connection the evidence shows that it would cost a maximum of \$10,000.00 per year to maintain and establish such law school at Lincoln University (R. 185-186), and that the cost to the state would be equally great if petitioner were admitted as a student in the Missouri University Law School and taught in a class separately from white students (R. 186).

Petitioner says in his brief (page 13) that the out-of-state scholarships have been administered by the state superintendent of schools and not by the Lincoln University curators. While this is immaterial—petitioner never having applied to either of these state agencies for out-of-state tuition—we desire to correct the erroneous impression created by petitioner's half-true statement. Section 9622 was enacted in 1921, and required the Lincoln University curators "to pay the reasonable tuition fees" for the attendance of negro residents at the university of an adjacent state. The duty of the Lincoln University curators to pay the full tuitions was mandatory (R. 221-222, and see *Lincoln University v. Hackmann*, 295 Mo. 118, 124). When the General Assembly, supplementing the appropriations to Lincoln University, appropriated additional sums, aggregating \$55,615.91, specifically for out-of-state tuition fees (Laws Mo., 1929, p. 61; Laws Mo., 1931, p. 28; Laws Mo., 1933, pp. 9, 87; Laws Mo., 1935, p. 113), the state superintendent of schools assumed the power to administer and disburse these special funds (R. 167-169). The net result is that there have been two state agencies charged with or exercising the duty of disbursing out-of-state tuition fees—the Lincoln University curators under Section 9622, and

the state superintendent of schools under the special appropriations acts. The superintendent of schools, incidentally, is *ex officio* a member of the Lincoln University board of curators (Sec. 9617, R. S. Mo., 1929).

Petitioner says (page 13) that the 1933 appropriation act reduced the scholarships from full tuition to the differential between the tuition at the out-of-state university and at the University of Missouri. This contention is fully answered by the state court's decision that the proviso limiting out-of-state tuition to the differential was "unconstitutional and void," and that petitioner was entitled, upon application, to full tuition (R. 221).

**QUALITY OF LEGAL EDUCATION AVAILABLE IN THE
UNIVERSITIES OF ADJACENT STATES EQUALS THAT
IN THE SCHOOL OF LAW IN THE
UNIVERSITY OF MISSOURI**

Petitioner's own evidence shows that the legal education which petitioner, pending the establishment of a law school in Lincoln University, would receive in the law school at any one of the four adjacent state universities (Kansas, Nebraska, Iowa or Illinois) would be substantially identical with the education he would receive if admitted into the Law School of Missouri University (R. 219, 117-118). All of those law schools are of the highest standing, members of the Association of American Law Schools, and on the approved list of the American Bar Association (R. 219, 113). A student desiring to practice law in Missouri can get as sound, comprehensive and valuable legal education in any one of these four law schools as he could get in the University of Missouri Law School. Petitioner's own witness so testifies (R. 219, 117-118); there was no countervailing testimony and the Missouri Supreme Court so found (R. 219).

The Missouri Supreme Court found as a fact that the University of Missouri Law School does not specialize in Missouri law and procedure (R. 219). The evidence supporting this finding of fact is fully reviewed in our statement of the case (pages 6-7, *supra*), and it appears at pages 99, 100, 109, 111-113, 115, 116, 117, 118, 119 and 144-145 of the record.

In each of the four adjacent state university law schools, as in the University of Missouri Law School, the system of education is exactly the same, designed to give the student such fundamental education in the law as will enable him to practice law in any state where the Anglo-American system of law obtains (R. 219, 109). In all five schools the same system of instruction is used (R. 219, 109, 113); and the courses of study and the casebooks used are substantially identical (R. 219, 155-157, 158-159, 160, 161, 162-163). Students frequently transfer from one to another of these five schools, receiving full credit for the work done in the former school, and moving right along without any loss of time (R. 219, 114).

PETITIONER'S LIVING AND TRAVEL EXPENSES.

Petitioner lived in St. Louis, and necessarily would have had to pay his living expenses, whether he attended Lincoln University or the University of Missouri, Illinois, Iowa, Nebraska or Kansas (R. 220).

The mere fact that in order to avail himself of legal education in any one of the four law schools in adjacent states, the petitioner (a grown man) would be put to the necessity of traveling further from his home in St. Louis than the distance from St. Louis to Columbia (where the University of Missouri is located), is a mere matter of inconvenience, which must necessarily arise as an incident to any classification or any

school system; and the court below held that this furnishes no substantial ground of complaint by petitioner (R. 220).

In *Lehew v. Brummell*, 103 Mo. 546, 552, the court said:

"The law does not undertake to establish a school within a given distance of anyone, white or black. The inequality in distances to be traveled by the children of different families is but an incident to any classification, and furnishes no substantial ground of complaint. *People ex rel. King v. Gallagher*, 93 N. Y. 438-451."

in *People ex rel. King v. Gallagher*, 93 N. Y. 438, 451-452, the New York court said:

"The fact that by this system of classification one person is required to go further to reach his place of instruction than he otherwise would is a mere incident to any classification of pupils in the public schools of a large city, and affords no substantial ground of complaint. * * * In the nature of things one pupil must always travel further to reach a fixed place of instruction than another, and so too the resident of one district is frequently required to go further to reach the school established in his own district than a school in an adjoining district; but these are inconveniences incident to any system, and cannot be avoided."

To the same effect are the following decisions:

Gong Lum v. Rice, 275 U. S. 78, 84.

Roberts v. City of Boston, (Mass.) 5 Cush. 198, 209-210.

State ex rel. Garnes v. McCann, 21 Ohio St. 109, 204, 211.

Cory v. Carter, 48 Ind. 327, 360-361.

Ward v. Flood, 48 Calif. 36, 42, 52-56.

Dameron v. Bayliss, (Ariz.) 126 Pac. 273, 274.

State ex rel. v. Board of Education, 7 Ohio Dec. 129.

People ex rel. Dietz v. Easton, (N. Y.) 13 Abbott's Practice (N. S.) 159, 161-162, 165.

United States v. Buntin, 10 Fed. 730, 735-6.

As a matter of fact, the petitioner's expense of travel to any of these adjacent state universities would be no greater than the traveling expense of students living in various parts of Missouri, who attend the University of Missouri at Columbia (R. 220, 90, 151-153). It would be no greater hardship on petitioner, a man now twenty-seven years of age, to travel from St. Louis to Champaign, Illinois, for example, than it would be for him to travel from St. Louis to Columbia, Missouri; or for a Missouri University student to travel from Caruthersville, Missouri, to Columbia, Missouri (R. 220, 152).

Even if petitioner's travel expense were slightly increased, this unavoidable disadvantage would be more than overcome by the fact that the Lincoln University curators would be required by law to pay the full amount of his tuition fees (Sec. 9622 R. S. Mo., 1929). These fees, for the first year of the law course, range in the four adjacent state universities from \$109.75 to \$178.00 (R. 220, 157-158, 159-160, 161, 162). In this respect he would enjoy temporarily a pecuniary advantage over white students attending the University of Missouri, who must pay tuition fees—which for the first year of the law course amount to \$127.50 (R. 220, 154-155)—without reimbursement from the State. Petitioner therefore can make no reasonable complaint based on the fact that, temporarily and until the establishment of a law department in Lincoln University, he would be required to travel further

than the distance from St. Louis to Columbia, in order to avail himself of education in an adjacent state.

PETITIONER REFUSES TO USE THE SCHOOL FACILITIES PROVIDED FOR HIM BY THE STATE OF MISSOURI

Although the State has made all reasonable provisions to afford petitioner the opportunity for legal education (Secs. 9618 and 9622, R. S. Mo., 1929), the petitioner has deliberately chosen not to avail himself of these provisions (R. 218-219). When he applied for admission to the University of Missouri, he was by the registrar referred to the president of Lincoln University (R. 65), who in turn wrote petitioner, calling his attention specifically to the provisions of the Lincoln University Act, and offering him aid thereunder (R. 72-73). Petitioner admits that he was thus fully advised of the provisions made for his benefit by the act, and he says that after full consideration he deliberately refused to avail himself of such rights (R. 74, 82, 83, 84). Instead of proceeding in a reasonable way, to take advantage of the rights provided for him by the state, we find him within 48 hours in consultation with the National Association for the Advancement of Colored People (R. 82, 84), whose counsel (his present counsel) advised him to refuse to avail himself of the rights provided by the Lincoln University Act, and to "keep on corresponding with Missouri University" (R. 84).

The record shows, and petitioner admits, that he has never made application to Lincoln University to give him what he seeks (R. 218-219, 222, 74, 82, 83, 84, 85-86). He refuses to apply to the state agency specifically charged with the mandatory duty to give him what he seeks; and instead attempts to force his way into the University of Missouri by mandamus. If he had availed himself of the rights he enjoys under the Lincoln University Act, and had seen fit to accept the opportunity offered to him

by the State of Missouri in August, 1935, he would by this time have completed his three-year law course.

Petitioner's refusal to avail himself of his rights under the Lincoln University Act is an "insuperable obstacle" to his recovery (*McCabe v. Atchison, Topeka & Santa Fe Railway Company*, 235 U. S. 151, 162-164).

AS TO PETITIONER'S ARGUMENT REGARDING A CONSTITUTIONAL MONEY EQUIVALENT FOR HIS ALLEGED RIGHT TO BE A STUDENT IN MISSOURI UNIVERSITY.

Petitioner argues in his brief (page 20) that if there could be a constitutional money equivalent for his alleged right to be a student in the School of Law of the University of Missouri, it would have to be the "per capita contribution which the state makes to the legal education of a white student figuring not only current expenditure but making a pro rata allowance for the capital investment in land, buildings and equipment as well—as, for example, the law building, the law library and other capital items." The fallacy in this argument is that no student has the right to demand a *per capita* expenditure by the state for his education, but his right ends when the state furnishes him educational facilities substantially equal to those furnished other citizens by the state. But even if, by any manner of reasoning, it could be established that petitioner would be entitled to receive this *per capita* expenditure, it would appear that the educational facilities here provided for his enjoyment not only render him equal *per capita* expenditure for educational facilities, but in addition provide for him the payment of out-of-state tuition fees, an advantage which the state does not accord to students in the Law School of the University of Missouri.

Petitioner overlooks the fact, a fact so well known that it is a matter of judicial knowledge, that in the

reciprocal practice of the different states of the Union in rendering educational facilities for higher educational training, they admit to their higher institutions of learning qualified students who may apply from any state. In other words, the University of Missouri, as this record shows, receives students from the State of Illinois, while Illinois University receives students from Missouri. The evidence shows that the facilities for legal education in the two states are of equal standing. By this reciprocal practice of receiving nonresident students, each state, including Missouri, spends sufficient capital to furnish substantially equal educational facilities to the students it receives. So that if petitioner should enter the Law School of the University of Illinois it could not truthfully be said that he was being educated at the expense of the State of Illinois, because to say this would overlook the fact that the State of Missouri furnishes like educational facilities to many residents of the State of Illinois. By this reciprocal practice between the higher institutions of learning of the various states, it so happens that a student attending any one of these recognized institutions of learning receives equal facilities for legal education. And it is by reason of the fact that this reciprocal practice exists that petitioner would certainly not be entitled to demand from the State of Missouri, in addition to payment of his tuition fees at Illinois University, the added per capita cost of educating white students at the Law School of the University of Missouri. If petitioner should enroll as a student in the Law School of the University of Illinois, and should receive from the State of Missouri (as he would) the tuition fees required for admission to that institution, he would receive that which a student at the Law School of the University of Missouri receives, to-wit, the opportunity of using substantially equal facilities for receiving a

sound legal education, and in addition he would also receive that which a resident Missouri student does not receive when entering the Law School of the University of Missouri, to-wit, his full tuition. Petitioner cannot justly ask for more than this.

In his brief petitioner attempts to belittle the provisions made by the State of Missouri for out-of-state tuitions, and he argues that these constitute no substantial equivalent for the legal education offered white residents in the Missouri University Law School. The State of Missouri does not merely offer petitioner out-of-state tuitions; the state offers him a legal education which is a substantial equivalent to the legal education offered white students in the University of Missouri Law School; and so far as tuitions are concerned, petitioner is actually given a pecuniary advantage over white students in the University of Missouri, in that pending the establishment of a school of law at Lincoln University the state pays his full tuition fees in the adjacent state university—an advantage which white students in the University of Missouri do not enjoy.

**CONSTITUTIONALITY OF PROVISION FOR OUT-OF-STATE
INSTRUCTION IS, STRICTLY SPEAKING, NOT
HERE FOR REVIEW.**

The question of the constitutionality of the provision for out-of-state instruction is, strictly speaking, not presented for review. This for the reason that petitioner never made any application to Lincoln University curators for the establishment of a law course in that institution; and, therefore, it is impossible to know whether the curators of Lincoln University, had he knocked at the door, would have immediately established a law course there, rendering it unnecessary

for him to go out-of-state for a legal education. It would only be in case he had applied there and they had refused or delayed establishment of a law school in that institution, that the question of the constitutionality of out-of-state instruction would arise (*McCabe v. Atchison, Topeka & Santa Fe Railway Co.*, 235 U. S. 151, 163-4).

However, we do not want to be misunderstood as to our position on this point. We are firmly of the opinion that had petitioner applied for the establishment of a law school at Lincoln University, and the Lincoln University curators had offered to pay his tuition out-of-state for the short interval of time that might have elapsed while they were establishing a law course at Lincoln University, the necessity of his temporarily attending a law school of an adjacent state would not in any manner have impinged upon his constitutional rights. As we have demonstrated above, the legal education that he would have thus acquired is equal in all respects to the legal education afforded at the University of Missouri; and in addition to that he would have received the financial advantage of free tuition.

When we consider the modern means of transportation, of interconnecting state highways, bus lines, railroads and interurbans, it cannot be said that any condition which might require petitioner (a mature man, now 27 years old) to attend law school in an adjoining state for a short time, while Lincoln University was establishing a law course, would deprive him of any constitutional right. It is no different in legal significance from the situation mentioned in some of the cases which we have reviewed, where colored children have been sent outside their own district, or have been sent to a greater distance than they would have

had to go had they attended a white school. Under all the authorities this is nothing more than an inconvenience, and in no event does it infringe the student's constitutional right.

AUTHORITIES CITED BY PETITIONER

The decision in *Pearson v. Murray*, 169 Md. 478, 182 Atl. 590, 103 A. L. R. 706, is distinguishable on grounds pointed out in the opinion below (R. 222-224).

The decision in *Gong Lum v. Rice*, 275 U. S. 78, 84, cited by petitioner, actually supports the decision below, and was quoted and followed by the opinion.

The decision in *Board of Education v. Board of Education*, 264 Ky. 245, 94 S. W. (2d) 687, cited by petitioner, does not in any manner discuss the legal proposition under which it is cited, and is not in point on any question involved in the instant case.

Petitioner cites 20 Minnesota Law Review, 673, 674, in which the writer says that "probably no foreign law school would offer training in the law of a state equal to that of its state university." This suggestion is completely answered by the evidence in this case, which shows without contradiction that the law school in the University of Missouri does not specialize in teaching Missouri law, and that the basis of instruction is the general common-law system prevailing throughout the United States; and a student desiring to practice in Missouri can get as sound, comprehensive and valuable legal education in the law schools of Kansas, Nebraska, Iowa and Illinois universities as in the University of Missouri (R. 219, 99, 100, 113, 116, 117, 118).

IV.

The proof offered both by petitioner and by respondents established the fact, and the state Supreme Court expressly found, that the state had afforded petitioner the equal protection of the laws, even though he was excluded from the University of Missouri.

Point III in petitioner's brief (pages 21-22) obviously has not even a remote bearing upon any federal question. In that point petitioner argues that respondents carried the burden of proof, a purely state question of procedure; and that officials of the University of Missouri (petitioner's own witnesses, for whose credibility he vouched) exhibited on the witness stand an "attitude of evasion and forgetfulness."

It would seem wholly unnecessary to answer such arguments in a proceeding such as this. This court on certiorari to review a state court decision is not concerned with local questions of procedure or with the credibility of witnesses. However, the answers to petitioner's arguments are clearly apparent from the record, and may be briefly presented.

1. The burden of proof did not rest upon respondents, but upon petitioner. The settled state rule as to this purely procedural question is that in a mandamus suit the burden is upon the relator to prove that he has a clear legal right to the relief sought; and this burden continues with the relator throughout (*State ex rel. Jacobsmeyer v. Thatcher*, 338 Mo. 622; *State ex rel. Cranfill v. Smith*, 330 Mo. 252; *State ex rel. Burnett v. School District of the City of Jefferson*, 335 Mo. 803, 812-813; *State ex rel. Buckley v. Thompson*, 323 Mo. 248; *Ex parte Ashcraft*, 193 Mo. App. 486).

Petitioner's discussion of the burden of proof is pointless. The opinion of the Missouri Supreme Court did not

(as it might properly have done) place the burden of proof upon petitioner—indeed, the opinion does not discuss the burden of proof at all. However, the opinion does fully state the essential facts (R. 210, 218-221, 222). These facts—proven largely by evidence offered by petitioner himself (R. 91, 119, 121, 128)—show that petitioner was accorded an opportunity for legal education substantially equivalent to that offered to white students in the University of Missouri School of Law. We respectfully submit, therefore, that any discussion of the question as to where the burden of proof rests is irrelevant and futile.

2. Petitioner's criticism of the University of Missouri officials as guilty of "evasion and forgetfulness" is unfair, as the record cited by petitioner demonstrates (R. 92-107, 122-123). As an illustration of the unfairness of this criticism, petitioner says (page 21 of his Brief) that Dean Masterson "could detail down to the last odd number the Missouri cases in the casebooks used in his school of law," but he "could not recall the policy of the Missouri Law Review." In point of fact, Dean Masterson did not purport to detail the number of Missouri cases in the casebooks; he merely identified tabulations which had been prepared, showing this information (R. 110-113). Moreover, Dean Masterson, instead of evading, testified frankly and in full detail regarding the policy of the Missouri Law Review (R. 100-106). Petitioner unfairly says that Dean Masterson testified that he could not "speak for the manner in which his instructors conduct their courses." In point of fact, his testimony on this point was as follows (R. 116): "Q. Would you not say that more attention would be paid to Missouri law as far as student instruction is concerned? I am not talking about instructors' research but about instruction. Reviewing your own course at Harvard, in your under-

graduate course at Harvard; wouldn't you say that there was more student instruction given to the students of Missouri University in Missouri law than was given to you at Harvard, in Missouri law? A. That is not true in the courses I teach. I can't speak for absolutely every instructor." Petitioner criticizes Dean Masterson because he testified that he could not testify offhand as to the value of the University of Missouri law library. In fact, his testimony on this point was as follows (R. 191): "Q. Could you duplicate the University of Missouri library for fifty thousand dollars? A. I could not say—I don't know. Q. What is your best opinion as the dean of an approved law school? A. Well, I think I would have to have a little time, with a pencil and piece of paper and 20 or 30 minutes." Petitioner's counsel then stated that he would ask for the answer after 20 or 30 minutes; but apparently he forgot to do so, and the matter was never referred to again (R. 191-196).

Petitioner says (page 22 of his Brief) that respondents "could produce itemized figures as to railroad distances and railroad fares (R. 152), but displayed unbelievable unfamiliarity with the fiscal operation of their own school of law (R. 122-123)." The fact is, the railroad distances and fares were not testified to by any witness, but were stipulated by counsel (R. 152-153). While witness Stanford, assistant secretary of the University of Missouri, was unable offhand to give from memory the figures desired by petitioner's counsel (R. 121-123), he later went to the trouble of preparing detailed tabulations showing the information, and they were received in evidence (R. 124-125). This witness was not required to prepare these tabulations, yet he did so as a matter of accommodation to petitioner's counsel (R. 123). And now petitioner's counsel criticizes

Mr. Stanford as "unbelievable" because, without previous notice that the information would be desired, he could not from memory give the complicated figures in the tabulations.

Wholly apart from the gross unfairness of petitioner's attack on witnesses Masterson and Stanford, petitioner is in no position to attack these witnesses, because they were his own witnesses and he vouched for their credibility.

Dunn v. Dunnaker, 87 Mo. 597.

Cooper v. Armour & Co., 222 Mo. App. 1176.

Choctaw & M. R. Co. v. Newton, (8 C. C. A.)
140 Fed. 225.

V.

Mandamus against respondents was not a proper remedy, because petitioner must exhaust his administrative remedies before seeking extraordinary relief; and this he failed to do.

It is a general rule, frequently applied by this court, that a suitor must exhaust his administrative remedies before seeking extraordinary relief (*Natural Gas Pipe Line Co. of America v. Slattery*, 58 Sup. Ct. Rep. 199, 204 and cases cited).

Petitioner concededly is entitled to an opportunity from the State of Missouri to obtain a legal education substantially equal to that provided by the state for other citizens of the state (R. 218). The Board of Curators of Lincoln University is the agency of the state entrusted with the power and charged with the duty to provide for petitioner this opportunity (R. 213-215, 219-222). Petitioner was entitled to demand from the Board of Curators of Lincoln University such opportunity; and if the opportunity were denied him, he was entitled to demand from

the board a right to be heard on the reasons upon which the board denied him the opportunity.

In point of fact petitioner never made any demand upon the Board of Curators of Lincoln University to provide him with such an opportunity (R. 218-219, 222); and the board has not denied him the opportunity. Until petitioner has sought to obtain from the Board of Curators of Lincoln University an opportunity for a legal education substantially equal to that provided by the state to other citizens of the state, and such opportunity has been denied him, and petitioner has sought a hearing from the board of the reasons upon which the board denied him such opportunity, petitioner is in no position to appeal to the courts for any remedy, and certainly not for mandamus, to compel the Board of Curators of Lincoln University to provide him with the opportunity for legal education which he says he desires, but which he has never requested from the authorities charged with the duty to provide it for him. *A fortiori*, petitioner could not appeal to the courts for mandamus to compel the Board of Curators of the University of Missouri to provide him with a legal education which he has not requested from the authorities charged with the duty to provide it for him (*Goldsmith v. United States Board of Tax Appeals*, 270 U. S. 117, 123; *Natural Gas Pipeline Co. v. Slattery*, 58 Sup. Ct. Rep. 199, 204; *Porter v. Investors' Syndicate*, 286 U. S. 461; *Petersen Baking Co. v. Bryan*, 290 U. S. 570, 575; *Ex parte Virginia Commissioners*, 112 U. S. 177).

IN CONCLUSION.

It is respectfully submitted that this case was properly decided by the Supreme Court of Missouri; and that petitioner's conceded right to equal facilities for education has not been denied. His refusal to avail himself of those facilities strongly suggests that his real purpose is to lend his name as litigant to those interested in furthering a movement to bring about social equality between the white and negro races. As we have pointed out, this is not a question which can be settled by laws or judicial decisions.

The State of Missouri has set up a complete and exclusive scheme and plan for the higher education of those negroes of the state who desire higher education. We submit that the plan is an entirely just, fair and adequate plan, under which any negro resident of the state may at the state's expense receive higher education in any branch of learning, including the law.

The policy of the state respecting separation of the races for purposes of education is believed by the people of the state to be a wise policy. Experience has shown it to be a wise policy. It has preserved order and discipline in the educational system. It has resulted in a steady advance in the education of each race. It has been established at an expenditure of millions of dollars.

The petitioner, in effect, asks this court to undo all this, and to overthrow the system of separate education ordained by the constitution, laws and public policy of

the state. It is respectfully submitted that petitioner makes no showing which would justify this revolutionary disruption of the state's educational system. We respectfully ask that certiorari be denied.

Respectfully submitted,

FRED L. WILLIAMS,
FRED L. ENGLISH,
NICK T. CAVE,
WILLIAM S. HOGSETT,
RALPH E. MURRAY,

Counsel for Respondents.

APPENDIX.

Appropriation acts by the Missouri General Assembly in favor of Lincoln University from 1921 to 1935, inclusive, but excluding \$500,000 appropriation held unconstitutional in Lincoln University v. Hackmann, 295 Mo. 118.

(Laws Mo. 1921, page 65). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund for Lincoln institute, Jefferson City, the sum of three hundred twenty-nine thousand five hundred (\$329,500) dollars, as follows:

Salaries	\$ 80,000
Support	50,000
Expense of board	2,000
Burner equipment and repairs	7,500
Repairs	60,000
Land	30,000

New building:

Dormitory	100,000
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Total	\$329,500.
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9 **(Laws Mo. 1921, page 101).** There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, for the payment of deficiency claim of the Lincoln institute, on file in the office of the state auditor, as follows: Missouri penitentiary electrical service rendered \$595.56.

(Laws Mo. 1923, page 51). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, the sum of eleven thousand nine

hundred forty-six and 41-100 (\$11,946.41) dollars, to pay the deficiency claims now on file in the state auditor's office on account of the salaries of the teachers and employees of Lincoln university for the years 1921 and 1922.

(Laws Mo. 1923, page 60). There is hereby reappropriated out of the state treasury, chargeable to the state revenue fund, the sum of forty-nine thousand three hundred thirty and 42-100 (\$49,330.42) dollars, the same being the balance in the fund appropriated by the fifty-first general assembly for the construction of a dormitory at Lincoln university, Jefferson City, which is now under contract and in the course of construction; it being the intention of this act to appropriate, only, such amount as may be in the state treasury to the credit of said building fund at the time the act originally appropriating said money shall expire.

(Laws Mo. 1923, page 60). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, the sum of seventy thousand (\$70,000.00) dollars, for the construction and equipment of a new heating and power plant and for furnishing and equipping the boys' new dormitory building at Lincoln university, Jefferson City, Missouri, as follows:

For the construction and equipment of a new power and heating plant	\$50,000.00
For the furnishing and installing furniture and equipping the boys' new dormitory building	15,000.00
Total	\$70,000.00

(Laws Mo. 1923, page 96). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund for Lincoln university, Jefferson

City, the ~~sum~~ of one hundred seventy-four thousand seven hundred thirty (\$174,730) dollars; as follows:

Salaries	\$113,000
Expense of board	2,000
Repairs	10,000
Support	49,730
Total	\$174,730

(Laws Mo. 1925, page 57). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, the sum of nine hundred and ninety-six dollars (\$996.00) to pay the deficiency claim of Lincoln university, on file in the state auditor's office, on account of supplies for the years 1923 and 1924.

(Laws Mo. 1925, page 78). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, for Lincoln university, Jefferson City, the sum of two hundred twenty-four thousand seven hundred dollars (\$224,700.00), as follows:

Salaries \$154,000.00

Plant and upkeep:

(Service employees; grounds (hot house, grading, lawn tools); buildings (academic-chapel enlargement and renovation, library furniture and books, repairs, academic furniture, enlarging and equipping dining room and kitchen) 10,000.00

General supplies:

(Water, gas, light and power, fuel, telephone, printing, stationery, and publications, postage and tolls, janitorial supplies) 48,700.00

Facilities of instruction:

(Chemical, physical, biological and psychological laboratories; musical instruments; machine shop; carpentry; auto mechanics; mechanical and free-hand drawing; printery; electrical fittings and plumbing; home economics supplies and equipment; livestock; implements)_____ 10,000.00

Miscellaneous:

(Curators; student labor; extension—field service)_____ 2,000.00

Total _____ \$224,700.00.

(Laws Mo. 1927, page 88). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, for Lincoln university, Jefferson City, the sum of two hundred seventy-eight thousand dollars (\$278,000.00) as follows:

Salaries	\$175,000.00
Plant and upkeep	15,000.00
General supplies	48,700.00
Facilities of instruction	20,000.00
Campus improvement and repairing President's house	9,300.00
Farm improvement	3,000.00
Library and laboratory equipment	5,000.00
Miscellaneous requirements	2,000.00
Total	\$278,000.00.

(Laws Mo. 1929, page 24). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund for Lincoln university, Jefferson City,

the sum of three hundred six thousand five hundred dollars, (\$306,500.00) as follows:

Salaries and support	\$180,000.00
Curators	2,000.00
Student labor	4,000.00
Dairy barn, tool house, hothouse and enlargement of poultry house	5,000.00
Campus improvement and repairing president's house	2,000.00
Farm improvement	1,000.00
Repairs on steam line, heating system and plumbing	6,000.00
Enlargement and remodeling dining room	4,000.00
Renovating two dormitories	5,000.00
Furniture for dormitories	3,000.00
Furniture for class rooms	3,000.00
Special repairs, roads, walks, campus, etc.	4,000.00
Enlargement of training school	2,000.00
Plant and upkeep	10,000.00
General supplies	42,500.00
Facilities of instruction	25,000.00
Library and laboratory equipment	5,000.00
Public lectures and extension	3,000.00
Total	\$306,500.00.

(Laws Mo. 1929, page 61). There is hereby appropriated out of the state treasury chargeable to the state revenue fund for the years 1929 and 1930 the sum of fifteen thousand (\$15,000.00) dollars to be used in paying the tuition of negro students to some standard college or university provided said students are pursuing courses in said college or university not offered at Lincoln university and which are being offered at the University of Missouri and also in providing high school

scholarships to Lincoln university, the amount of said scholarship to be determined by the state superintendent of schools, provided said student has completed the elementary course of study and lives in a district that does not provide high school facilities for negro children and does provide high school facilities for white children. The funds provided for in this section shall be paid out by the state treasurer upon vouchers properly approved by the state superintendent of schools and audited by the state auditor.

(Laws Mo. 1929, page 101). There is hereby appropriated out of the state treasury, chargeable to the general revenue fund the sum of two hundred and fifty thousand (\$250,000.00) dollars for the construction and equipment of an educational building at Lincoln university at Jefferson City.

(Laws Mo. 1931, pages 27-28). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, * * *

For the use of the state superintendent of schools in paying the tuition of negro students who have completed at least two years of standard college education to some standard college or university, provided such said students are not pursuing courses in such college or university leading to the A.B. in liberal arts, or the B.S. in education but are pursuing courses in such college or university not offered at Lincoln university, but which are being offered at the university of Missouri; and, also, in providing high school scholarships to Lincoln university or fully accredited negro high schools in Mis-

souri, provided said high school students have completed the elementary course of study and lives in a district that does not provide high school facilities for negro children but does provide high school facilities for white children: the amount of such said scholarships to be determined by the state superintendent of schools. The fund provided by this appropriation shall be paid out of the state treasury upon vouchers properly drawn by the state superintendent of schools and audited by the state auditor _____ \$15,000.00.

(Laws Mo. 1931, pages 41-47). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, for the payment of salaries, wages, and per diem of the officers and employees; for the original purchase of property; for the repair and replacement of property; for operative expenses and other purposes of * * * Lincoln university at Jefferson City and for Lincoln university to be used by its board of curators in the supervision and management of the demonstration farm, and agricultural school for the negro race as now established at Dalton, * * * for the years 1931 and 1932, the following items and amounts:

A. Personal Service:

Salaries, wages and per diem of the president, deans, professors, and other employees, and student labor _____ \$200,000

B. Additions:

There is hereby appropriated out of the state treasury, chargeable to the general revenue fund, the unexpended balance of \$250,000, ap-

appropriated by the fifty-fifth General Assembly for the construction and equipment of an additional building at Lincoln university, in Jefferson City, such unexpended balance being 208,155

Operative equipment; laundry, cleaning and sanitation equipment, production and construction equipment	6,000
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Total additions	\$414,155
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C. Repairs and Replacements:

Buildings	10,000
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Operative equipment, including educational and recreational equipment, household, kitchen and dining room equipment	18,000
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Total repairs and replacements	\$28,000
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D. Operation:

General expense; including communication, printing and binding, transportation of things, and travel	6,500
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Material and supplies; educational, scientific and recreational supplies, grounds and roadways, material and supplies, household supplies, light, heat, power and water supplies, stationery and office supplies	72,000
--	--------

Total operation	\$78,500
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Total Lincoln university at Jefferson City, Mo.	\$520,655.
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(Laws Mo. 1933, page 9). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund the following sums, or so much thereof as

may be necessary for the purpose of paying the following deficiencies, reliefs and refunds:

State Superintendent of Schools—Tuition, Negro
Students

\$5,615.91

(Laws Mo. 1933, page 87). There is hereby appropriated out of the state treasury, chargeable to the general revenue fund, for the years 1933 and 1934 the sum of ten thousand dollars (\$10,000.00) to be used in paying the tuition of Negro college students to some standard college or university not located in Missouri, provided said students have completed at least sixty hours of standard college work, are bona fide residents of Missouri, and are not pursuing courses in such college or university leading to the A.B. degree in Liberal Arts or the B.S. Degree in Education, but are pursuing courses in such college or university not offered at Lincoln University but which are offered at the University of Missouri; provided that the total amount paid shall not exceed the difference between the registration and incidental fees charged by the University of Missouri to resident students and the school attended for similar courses; provided further, that the amount paid shall not exceed one hundred dollars (\$100.00) per school year of nine months for undergraduate work and one hundred fifty dollars (\$150.00) per school year of nine months for graduate work; provided further, that the tuition for all students attending terms of less than nine months shall be prorated on the above basis.

(Laws Mo. 1933, pages 119-131). There is hereby appropriated out of the state treasury, chargeable to the state revenue fund, for the payment of salaries, wages, and per diem of the officers and employees; for the

original purchase of property; for the repair and replacement of property; for the operative expenses and other purposes of * * * Lincoln university at Jefferson City, * * * for the years 1933 and 1934, the following items and amounts:

A. Personal Service:

Salaries of President, Business manager, Deans, Professors, Instructors, Physician, Librarian, Secretary, Registrar, Assistant Librarian, firemen, farmer, nurse and student labor \$200,000

C. General and special repairs and operative equipment 16,000

D. Operation:

General expense; including communication, printing and binding, transportation of things, travel, educational, scientific and recreational supplies, farm and garden supplies, grounds and roadways material and supplies, household supplies, laundry, cleaning and sanitation supplies, light, heat, power, and water supplies, medical, surgical and hospital supplies, small tools, miscellaneous supplies and repairs, stationery and office supplies 70,000

Total Lincoln University at Jefferson City;
Mo. \$286,000.

Payable out of the "Lincoln University fund," as follows:

A. Personal Service:

Salaries of President, Business manager, Deans, Professors, Instructors, Physician, Librarian,

Secretary, Registrar, Assistant Librarian, firemen, farmer, nurse and student labor _____ \$ 16,000

C. General and special repairs and operative equipment _____ 2,000

D. Operation:

General expense; including communication, printing, and binding, transportation of things, travel, educational, scientific and recreational supplies, farm and garden supplies, grounds and roadways material and supplies, household supplies, laundry, cleaning and sanitation supplies, light, heat, power, and water supplies, medical, surgical and hospital supplies, small tools, miscellaneous supplies and repairs, stationery and office supplies _____ 22,000

Total for Lincoln University, at Jefferson City, Missouri, from funds _____ \$40,000.

(Laws Mo. 1935, pages 54-67). There is hereby appropriated out of the state treasury, chargeable to the funds herein designated, for the payment of salaries, wages and per diem of the officers, teachers and employees; for the original purchase of property; for the repair and replacement of property; for the operative expenses and other purposes of * * * Lincoln University at Jefferson City * * * for the years 1935 and 1936, the following items and amounts:

For Lincoln University, payable out of State revenue fund, as follows:

A. Personal Service:

Salaries of President, business manager, deans, professors, instructors, physician,

librarian, secretary, registrar, assistant librarian, firemen, farmer, nurse, and student labor _____ \$200,000.00

B. Additions:

Buildings, building equipment, operative equipment, water supplies and plumbing, educational and recreational equipment, laboratory and scientific equipment, furniture and equipment _____ 100,000.00

C. Repairs and Replacements:

General and special repairs and operative equipment _____ 20,000.00

D. Operation:

General expense; including communication, printing and binding, transportation of things, travel, educational, scientific, and recreational supplies, farm and garden supplies, household supplies, laundry, cleaning and sanitation supplies, light, heat, power, and water supplies, medical, surgical and hospital supplies, small tools, miscellaneous supplies and repairs, stationery and office supplies _____ 80,000.00

Total Lincoln University out of State revenue fund _____ \$400,000.00

For Lincoln University, payable out of the Lincoln University Fund, as follows:

A. Personal Service:

Salaries of President, business manager, deans, professors, instructors, physician, librarian,

secretary, registrar, assistant librarian, firemen, farmer, nurse and student labor.....\$12,000.00

C. Repairs and Replacements:

General and special repairs and operative equipment 2,000.00

D. Operation:

General expense; including communication, printing and binding, transportation of things, travel, educational, scientific and recreational supplies, farm and garden supplies, grounds and roadways material and supplies, household supplies, laundry, cleaning and sanitation supplies, light, heat, power, and water supplies, medical, surgical and hospital supplies, small tools, miscellaneous supplies and repairs, stationery and office supplies..... 20,200.00

Total for Lincoln University payable out of
Lincoln University Fund.....\$34,200.00.

(Laws Mo. 1935, page 113). Tuition for Negro college students.—There is hereby appropriated out of the State Treasury chargeable to the general revenue fund for the years 1935 and 1936, the sum of Ten Thousand Dollars (\$10,000.00) to be used in paying the tuition of negro college students to some standard college or university not located in Missouri, provided said students have completed at least sixty hours of standard college work, are *bona fide* residents of Missouri, and are not pursuing courses in such college or university leading to the A. B. degree in Liberal Arts, or the B. S. degree in Education, but are pursuing courses in such college or university not offered at Lincoln University, but which

are offered at the University of Missouri; provided that the total amount paid shall not exceed the difference between the registration and incidental fees charged by the University of Missouri to resident students and the school attended for similar courses; provided further, that the amount paid shall not exceed One Hundred Dollars (\$100.00) per school year of nine months for undergraduate work, and One Hundred Fifty Dollars (\$150.00) per school year of nine months for graduate work; provided further, that the tuition for all students attending terms of less than nine months shall be prorated on the above basis.

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**CHARLES ELMORE GOSPLEY
CLERK**

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 57.

**STATE OF MISSOURI EX REL. LLOYD L. GAINES,
PETITIONER,**

VS.

**S. W. CANADA, REGISTRAR OF THE UNIVERSITY OF
MISSOURI, AND THE CURATORS OF THE
UNIVERSITY OF MISSOURI,
RESPONDENTS.**

RESPONDENTS' SUPPLEMENTAL BRIEF.

**FRED L. WILLIAMS,
FRED L. ENGLISH,
NICK T. CAVE,
WILLIAM S. HOGSETT,
RALPH E. MURRAY,
*Counsel for Respondents.***

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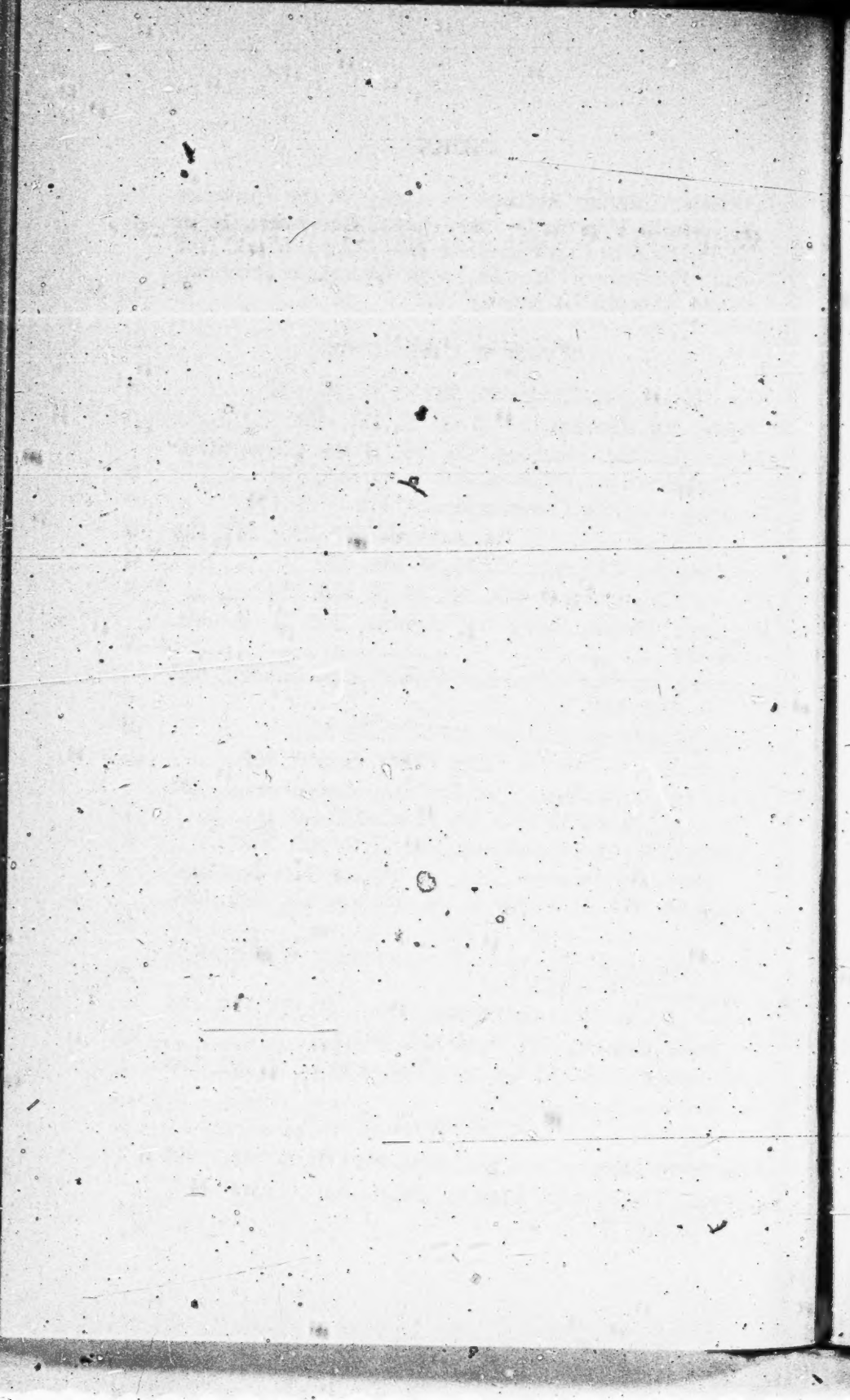
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S. W. CANADA, REGISTRAR OF THE UNIVERSITY OF
MISSOURI, AND THE CURATORS OF THE
UNIVERSITY OF MISSOURI,
RESPONDENTS.

RESPONDENTS' SUPPLEMENTAL BRIEF.

Petitioner has elected to stand upon the brief filed in support of his petition for certiorari. Respondents stand upon their brief filed in opposition to the granting of the writ. Respondents also file and respectfully submit this supplemental brief.

Petitioner, having refused to apply to the board of curators of Lincoln University for a legal education, is in no position to contend that that board would not have furnished him the legal education provided by the Lincoln University Act.

In our former brief (pages 34-38) we show that under the Lincoln University Act (Secs. 9616-9624, R. S. Mo.,

1929) it is the mandatory duty of the board of curators of Lincoln University, upon petitioner's application, (a) to establish a school of law in Lincoln University equal to that in the University of Missouri, and to admit petitioner as a student therein; and (b) pending the establishment of such school of law, and as a temporary matter, to arrange for the attendance of petitioner in one or another of the schools of law already established in the universities of Kansas, Nebraska, Iowa or Illinois (all of which admit negroes), and to pay his tuition fees while he is attending such school.

At pages 60-61 of our former brief we refer to the evidence showing that petitioner refused to avail himself of these provisions made by the state for his benefit (Rec. 74, 82, 83, 84, 85-86, 218-219, 222).

The evidence shows without dispute that if petitioner had requested the Lincoln University curators to furnish him facilities for education in the law, it would have been entirely feasible for the board to have established a school of law in that institution. On that point petitioner's witness, Dean W. E. Masterson, testified (Rec. 184-187):

"Q. Dean, in the light of the examination of Dr. Elliff about the establishment of a law school at Lincoln University—I want to ask you, as an educator and as dean of the law school here what, in practical effect, would have to be done to set up a law school at Lincoln University for the instruction in law of one or two students. Just tell us what you would do if you were setting out to do that.

A. You must first have a library, of course. I understand they have that. Second, you would have a place for meeting the student and reciting with him. I understand they have that. Then, of course, you must have competent instruction to teach a full year curriculum. That would require, I should say, two teachers of law. That would give them just about the amount of law that the individual instructor on the faculty here has at this university.

Q. Now at what expense could a law school be established in Lincoln University for the instruction in law of one or two students, to give them such law school and standard of training equal to that in the Missouri University Law School?

A. Since you have the library there and the buildings—about the only item of expense would be the salaries of those two instructors.

Q. What would that be, to get men of equal grade with what you have in Missouri University?

A. I should say that you could get very excellent teachers of law varying from \$3,500.00 to \$5,000.00 a year.

Q. Assuming the top figure, could you establish a law school in Lincoln University for the instruction of one or two students and on a level of scholarship and training equal to that in Missouri University for a maximum of \$10,000.00 a year?

A. I think so.

Q. If, on the other hand, a negro were admitted into the Law School of the University of Missouri, and educated in a separate class in accordance with the public policy of the state, would not that expense to the State of Missouri, to supply separate instruction in the Missouri University Law School be as great as it would to establish it in Lincoln University?

A. It would, because our present teaching staff already have full classes. If we gave additional instruction, in separate classes, it would require two extra teachers.

Q. If there was a demand made upon Lincoln University board of curators to establish a law school in Lincoln for one or two men students, and capable men of the kind you have been talking about would be employed to instruct that one or two students, would they not, having the entire time and attention of their instructors, receive at least as adequate instruction, if not better—

A. They would receive—

Q. Than if they were members of a class of forty students?

A. They would receive much better instruction.

Q. In the ordinary routine of instructing a class of forty students or thirty to fifty students, a student, in the nature of things, cannot recite often, can he?

A. He cannot.

Q. But with one or two students having the attention of the instructor, he would be practically having a private tutor?

A. He would.

Q. Is that of value to a student?

A. Of great value."

The evidence also shows without dispute that Lincoln University had ample funds with which to establish a school of law (Rec. 147, and see Laws, Mo., 1935, p. 36).

The law presumes that if petitioner should apply to the board of curators of Lincoln University for a legal education, that board would perform its legal duty to establish a school of law in that institution equal to the one in the University of Missouri. This is but the application of the general principle that the law presumes that a public officer charged with the performance of a certain duty will perform that duty. And even in those cases where the performance of the duty involves the exercise of some discretion, the law presumes that the officer will properly exercise such discretion. In *Hall v. Geiger-Jones Company*, 242 U. S. 539, 554, this court said:

"The discretion of the commissioner is qualified by his duty, and besides, as we have seen, the statute gives judicial review of his action. Pending such review we must accord to the commissioner a proper sense of duty and the presumption that the functions entrusted to him will be executed in the public interest, not wantonly or arbitrarily to deny a license to or take one away from a reputable dealer (*Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 545); * * * (Italics ours).

In *Lehmann v. State Board of Public Accountancy*, 263 U. S. 394, 398, this court said:

Plaintiff in error puts some stress upon the absence of rules by the board, urging that the statute is in conflict with the Constitution of the United States because it purports to authorize the revocation of a certificate 'without defining or determining in advance what grounds or facts or acts shall be sufficient cause for such revocation.' Such absence permits, it is asserted, arbitrary action. *We cannot yield to that assertion or assume that the board will be impelled to action by other than a sense of duty or render judgment except upon convincing evidence introduced in a regular way with opportunity of rebuttal. We certainly cannot restrain the board upon the possibility of contrary action. Official bodies would be of no use as instruments of government if they could be prevented from action by the supposition of wrongful action.*"*

In *Utah Power & Light Co. v. Pfof*, 286 U. S. 165, 190, this court said:

"It is said that the commissioner, who administers the act, has not provided for these deductions or the means for determining them. But the commissioner must administer the act as it is construed, and it is not to be supposed that he will not now properly do so."

In *Dalton Adding Machine Co. v. State Corporation Commission of Virginia*, 236 U. S. 699, 701, this court said:

"The general principle is that it is not for the courts to stop officers of this kind from performing their statutory duty for fear that they should perform it wrongly. *First Nat. Bank of Albuquerque v. Albright*, 208 U. S. 548, 553."

In *Plymouth Coal Co. v. Commonwealth of Pennsylvania*, 232 U. S. 531, 545, this court said:

"It is to be presumed, until the contrary appears, that the administrative body would have acted with

*All italics in all quotations in this brief are ours.

reasonable regard to the property rights of plaintiff in error; and certainly if there had been any arbitrary exercise of its powers its determination would have been subject to judicial review. *Lieberman v. Van De Carr*, 199 U. S. 552, 562; *Bradley v. Richmond*, 227 U. S. 477, 483."

In *Bradley v. Richmond*, 227 U. S. 477, 483, this court said:

"But it is said that after all there is no security that the city council will not in the end approve of a scheme of classification operating most unjustly. The same objection might be made with reference to any tribunal required to determine such a matter. The presumptions which must be indulged run counter to the suggestion made."

Petitioner is in no position to contend that, if he had applied, the curators of Lincoln University would not have furnished him the legal education provided by the Lincoln University Act. And petitioner is in no position to contend for the right to admission in the University of Missouri, if the legal education available to him (either in a law school in Lincoln University equal to the law school in the University of Missouri, or in a law school in an adjacent state university) afforded him opportunity for a legal education substantially equal to that provided for white citizens of the state. This is true because it is to be presumed that the Lincoln University curators would have afforded him the fullest rights to which the *Lincoln University Act* entitled him. For these reasons the question of the constitutionality of the provision for out-of-state instruction is not presented for review. This because, petitioner never having made any application to Lincoln University for a legal education in that institution, it is entirely impossible to know whether the curators of that institution, had he applied, would have immediately established a law course there, equal to the one in the University of Missouri, and thereby have ren-

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dered it unnecessary for petitioner to go out of the state for a legal education.

In the effort to avoid the effect of his refusal to apply to Lincoln University, petitioner in effect asks this court to assume that if he had so applied his application would have been rejected. In the first place, there is absolutely no evidence upon which to base any such assumption. In the second place, petitioner's position is directly in conflict with the presumption that the Lincoln University board would have properly and justly performed its duty. In the third place, petitioner's contention is in conflict with the rule that no one is entitled to judicial relief until the prescribed administrative remedy has been exhausted.

In *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 50-51, 58 Sup. Ct. Rep. 459, 463, this court said:

"The corporation contends that, since it denies that interstate or foreign commerce is involved and claims that a hearing would subject it to irreparable damage, rights guaranteed by the Federal Constitution will be denied unless it be held that the district court has jurisdiction to enjoin the holding of a hearing by the board. So to hold would, as the government insists, in effect substitute the district court for the board as the tribunal to hear and determine what Congress declared the board exclusively should hear and determine in the first instance. The contention is at war with the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

In *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 616-617, this court said:

"One who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal. *Lehon v. Atlanta*, 242 U. S. 53, 56; *Smith v. Cahoon*, 283 U. S. 553, 562. He should apply and see what happens."

In *Petroleum Exploration, Inc., v. Public Service Commission*, 304 U. S. 209, 222-3, 58 Sup. Ct. Rep. 834, 841, this court said:

"By the process of injunction the federal courts are asked to stop, at the threshold, the effort of the Public Service Commission of Kentucky to investigate matters entrusted to its care by a statute of that commonwealth obviously within the bounds of state authority in many of its provisions. The preservation of the autonomy of the states is fundamental in our constitutional system. The extraordinary powers of injunction should be employed, to interfere with the action of the state or the depositaries of its delegated powers, only when it clearly appears that the weight of convenience is upon the side of the protestant. 'Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state.'"

In *Bourjois, Inc., v. Chapman*, 301 U. S. 183, 188, the complainant sought to enjoin enforcement of an act regulating cosmetics, which act required registration of cosmetics and gave a board power to refuse certificates to preparations containing harmful ingredients. In its opinion this court said:

"The plaintiff contends that in other respects the statute violates rights protected by the Fourteenth Amendment and the Constitution of the State. It objects that the power conferred upon the board to grant or deny a certificate is unlimited; that the board has issued no regulations; and that neither the statute nor the board has provided for hearing an applicant. The plaintiff has not applied for a certificate; and it is not to be assumed that, if it concludes to do so, its application will be refused, or that the board will deny any right to which it is entitled."

In *Natural Gas Co. v. Slattery*, 302 U. S. 300, 309, the complainant brought suit to enjoin the Illinois Commerce Commission from enforcing an order by which the gas

company was required to open its books to the commission and furnish certain statistical data for use in a proceeding pending against it. The gas company contended that the commission would arbitrarily make use of the data in fixing the company's rates. In dealing with that contention, this court said:

"It will be time enough to challenge such action of the commission when it is taken or at least threatened, *First National Bank v. Albright*, 208 U. S. 548; *Dalton Adding Machine Co. v. State Corporation Comm'n*, 236 U. S. 699, and to consider whether appellant has standing to make the challenge."

In *Goldsmith v. Board of Tax Appeals*, 270 U. S. 117, 123, Goldsmith, a certified public accountant, brought suit for mandamus against the Board of Tax Appeals, to compel the board to enroll him as an attorney with the right to practice before it. The board set up grounds for its refusal to admit him to practice before it. In affirming the refusal of mandamus, this court said:

"The petitioner as an applicant for admission to practice was, therefore, entitled to demand from the board the right to be heard on the charges against him upon which the board has denied him admission. But he made no demand of this kind. Instead of doing so, he filed this petition in mandamus in which he asked for a writ to compel the board summarily to enroll him in the list of practitioners, and to enjoin it from interfering with his representing clients before it. He was not entitled to this on his petition. Until he had sought a hearing from the board, and been denied it he could not appeal to the courts for any remedy and certainly not for mandamus to compel enrollment."

In *Gundling v. Chicago*, 177 U. S. 183, 186, the plaintiff in error was convicted in a police court for violation of an ordinance of Chicago forbidding the sale of cigarettes without a license. He challenged the constitutionality of the ordinance, on the ground that it granted arbitrary

power to the mayor to grant or refuse a license thereunder. This court said:

"It seems somewhat doubtful whether the plaintiff in error is in a position to raise the question of the invalidity of the ordinance because of the alleged arbitrary power of the mayor to grant or refuse it. He made no application for a license, and of course the mayor has not refused it. *Non constat*, that he would have refused it if application had been made by the plaintiff in error. Whether the discretion of the mayor is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of that discretion in his favor and was not refused a license."

In *Smith v. Cahoon*, 283 U. S. 553, 561-2, the appellant, a private carrier for hire, was arrested upon a warrant charging him with operating vehicles upon the highways of Florida without a certificate of public convenience and necessity. The appellant challenged the validity of the statute requiring such a certificate. In the course of its opinion this court said:

"From statements made at the bar, it would appear that the appellant was engaged in the business above mentioned when the act was passed and hence that he would be entitled to a certificate, provided he complied fully with the provisions of the act. By the terms of the act such compliance would be necessary. The appellant did not apply for a certificate, and the principle is well established that when a statute, valid upon its face, requires the issue of a license or certificate as a condition precedent to carrying on a business or following a vocation, one who is within the terms of the statute, but has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration."

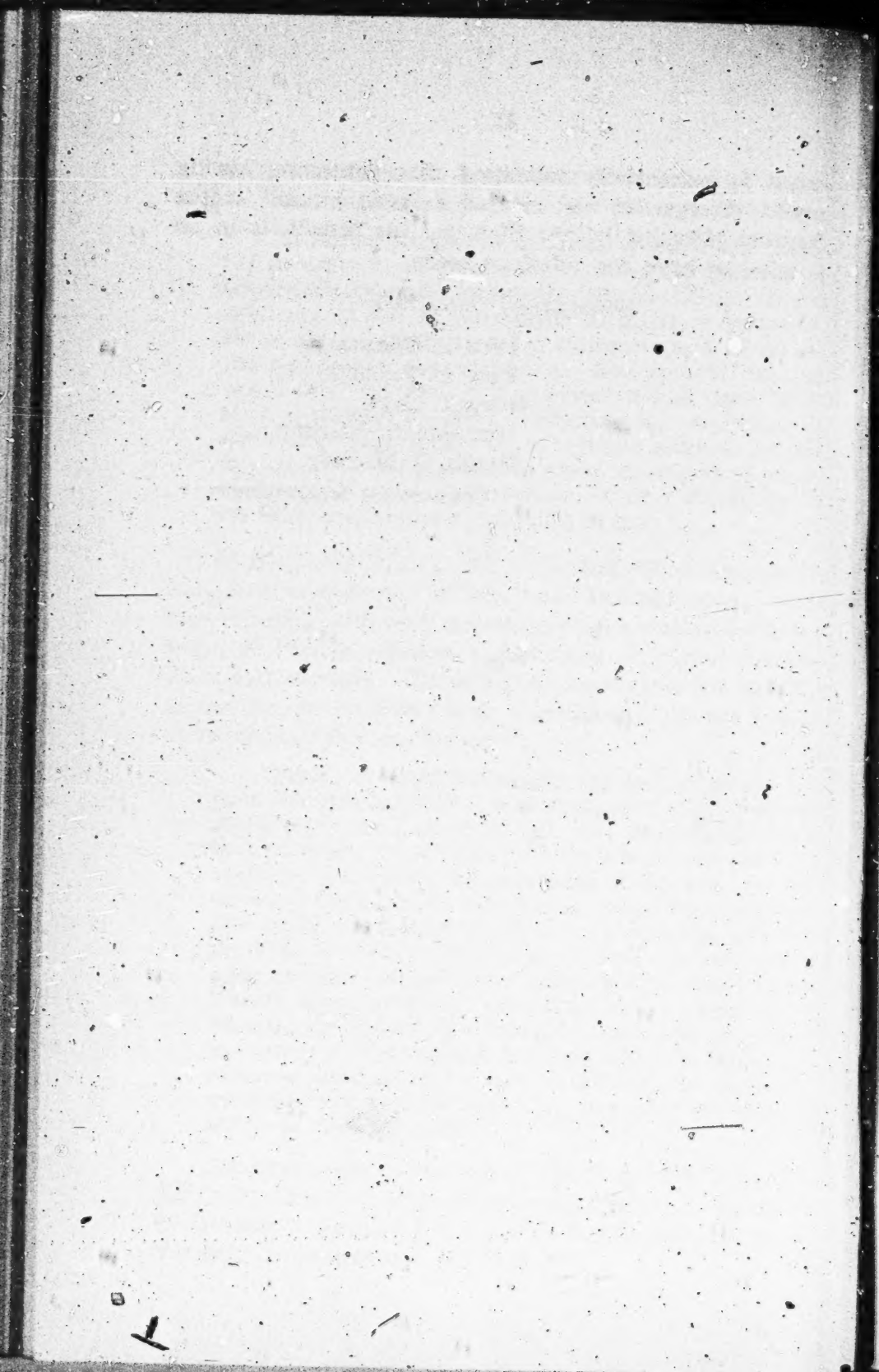
See, also, *Porter v. Investors Syndicate*, 286 U. S. 461, 468, 471; *Lehon v. City of Atlanta*, 242 U. S. 53, 55-6; *Lieberman v. Van De Carr*, 199 U. S. 552, 562; *Ex Parte Virginia Commissioners*, 112 U. S. 177.

It is respectfully submitted that petitioner, having wholly disregarded and refused to avail himself of the facilities provided by the State for his benefit, is in no position to have the relief he seeks.

Respectfully submitted,

FRED L. WILLIAMS,
FRED L. ENGLISH,
NICK T. CAVE,
WILLIAM S. HOGSETT,
RALPH E. MURRAY,

Counsel for Respondents.



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**CHARLES ELMORE CROPLEY
CLERK**

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 57.

**STATE OF MISSOURI EX REL. LLOYD L. GAINES,
PETITIONER,**

VS.

**S. W. CANADA, REGISTRAR OF THE UNIVERSITY OF
MISSOURI, AND THE CURATORS OF THE
UNIVERSITY OF MISSOURI,
RESPONDENTS.**

**PETITION OF THE RESPONDENTS FOR A
REHEARING.**

**FRED L. WILLIAMS, BY
FRED L. ENGLISH,
NICK T. CAVE,
WILLIAM S. HOGSETT,**

Counsel for Respondents.



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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 57.

STATE OF MISSOURI EX REL. LLOYD L. GAINES;
PETITIONER,

VS.

S. W. CANADA, REGISTRAR OF THE UNIVERSITY OF
MISSOURI, AND THE CURATORS OF THE
UNIVERSITY OF MISSOURI,
RESPONDENTS.

PETITION OF THE RESPONDENTS FOR A REHEARING.

Come now the above-named respondents, S. W. Canada, registrar of the University of Missouri, and the curators of the University of Missouri, and present this, their petition for a rehearing of the above-entitled cause, and, in support thereof, respectfully show:

I.

The court's construction of the equal protection clause applied in this case is not in accord with prior interpretations of the clause by this court, and is erroneous.

In holding that the State of Missouri is bound to furnish Gaines equal facilities for legal education *within its own borders*, and cannot satisfy his constitutional right

to equal protection by furnishing such facilities in an adjacent state university, the court has construed and applied the equal protection clause of the fourteenth amendment in a manner not justified by its language, and not in accordance with the settled construction of the clause as heretofore applied by this Honorable Court.

The court holds that the question whether the provision for the legal education in other states of negroes resident in Missouri is sufficient to satisfy the constitutional requirement of equal protection, is "the pivot upon which this case turns" (page 6 of printed opinion). The court then says that the relative advantages of legal education within and without the State are matters beside the point; that the validity of laws separating the races rests wholly upon the equality of privileges given to the separated groups "*within the State*" (page 6); that the State's obligation of equal protection, "can be performed only where its laws operate, that is, *within its own jurisdiction*"; that "it is *there* that the equality of legal right *must be maintained*" (page 7); and that the State was bound to furnish Gaines equal facilities for legal education "*within its borders*" (page 8). The court concludes that Gaines was entitled to be admitted to the law school of the University of Missouri "in the absence of other and proper provision for his legal training *within the State*" (page 9).

The equal protection clause provides that no state shall "deny to any person *within its jurisdiction* the equal protection of the laws." The court in this case has construed the words "*within its jurisdiction*," to mean that the State of Missouri must provide legal instruction for Gaines *within its borders*, and may not satisfy his con-

(All italics in quotations are ours.)

stitutional right to equal protection by contracting or arranging, at the State's expense, for his legal education in a nearby adjacent state university, regardless of the high quality of legal education there available to him.

This is a new interpretation of the equal protection clause, and one which (so far as our research discloses) has never before been applied by this Honorable Court. Heretofore the phrase "within its jurisdiction" has been interpreted merely as limiting the guaranty of equal protection of the laws to *persons who are physically within the territorial jurisdiction of the State*. The phrase has heretofore been construed as defining the persons to whom equal protection must be accorded, and has never before been construed as limiting the territory within which facilities accomplishing equal protection may be used. Decisions construing the phrase are as follows:

In *Blake v. McClung*, 172 U. S. 239, 260-1, the court said:

"It is equally clear that the Virginia corporation cannot rely upon the clause declaring that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' That prohibition manifestly relates only to the denial by the State of equal protection to persons 'within its jurisdiction.'"

In *Southern Ry. Co. v. Greene*, 216 U. S. 400, 417, the court said:

"We, therefore, reach the conclusion that the corporation plaintiff, under the conditions which we have detailed, is, within the meaning of the fourteenth amendment, a person within the jurisdiction of the State of Alabama, and entitled to be protected against any statute of the state which deprives it of the equal protection of the laws."

In *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110, 116, the court said:

"The provision of the fourteenth amendment, which went into effect in July, 1868, is, that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' The first question which arises is, whether this corporation was a person within the jurisdiction of the State of New York, with reference to the subject of controversy and within the meaning of the amendment."

In *Yick Wo v. Hopkins*, 118 U. S. 356, 369, the court said:

"The fourteenth amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

In *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 400, the court said:

"The equal protection clause extends to foreign corporations within the jurisdiction of the state and safeguards to them protection of laws applied equally to all in the same situation. Plaintiff in error is entitled in Pennsylvania to the same protection of equal laws that natural persons within its jurisdiction have a right to demand under like circumstances."

To the same effect are the following:

Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U. S. 544, 550.

National Council of United American Mechanics v. State Council of Virginia, 203 U. S. 151, 163.

Atchison, Topeka & Santa Fe Railway Co. v. Vosburg, 238 U. S. 56, 59.

12 Corpus Juris 1142.

It is respectfully submitted that the meaning thus applied to the phrase "within its jurisdiction" by these decisions is correct, and that the words were not intended, and should not be construed, to define or limit the place where the State must supply the facilities fulfilling equal protection.

If in this case the court will give to the phrase "within its jurisdiction" only the meaning heretofore applied, the result will be to hold that Missouri may not deny to petitioner, who is a "person within its jurisdiction," facilities for legal education equal to those provided for its white citizens. This proposition has never been denied by the state court or by the respondents.

But this court has departed from its settled construction, and has now for the first time construed the phrase "within its jurisdiction" as defining, not merely the person to whom equal protection must be accorded, but the place or territory within which the facilities implementing equal protection must be used.

The construction formerly applied by the court will not require the State to provide facilities for legal education for petitioner within the State, and will only require that the facilities provided for him shall be equal to those provided for white citizens.

We respectfully call attention to the fact that no authority is cited for the construction now adopted. We believe no authority exists.

It is also a fact that the construction applied by the court was not presented or even suggested in petitioner's brief—for which reason it was not discussed in respondents' brief. *So the case is decided upon a question not actually presented.* The gravity of the question is apparent. We respectfully submit that a question so fundamental and of such far-reaching effect should be finally decided by this Honorable Court only after full presentation.

II.

The court overlooks the right of Missouri to enter into a contract with another state to supply the facilities for legal education to Gaines.

The court in its decision overlooks the fact that the Missouri statute (Sec. 9622, R. S. Mo., 1929) authorizes the curators of Lincoln University to contract with the university of an adjacent state to supply Gaines the facilities for a legal education equal to those afforded white students at the University of Missouri. The constitution recognizes that states will contract with each other (Art. I, Sec. 10). Such contract need not be in writing, and may be a mere verbal understanding (*Holmes v. Jennison*, 14 Pet. 540, 572). The State of Missouri has the right to enter into a contract with another state, the adjacent State of Illinois, for example, to furnish Gaines the facilities for a legal education, and such a contract is valid even without the consent of Congress. In *Virginia v. Tennessee*, 148 U. S. 503, 518, the court said:

"There are many matters upon which different states may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter state might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that state to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that state in that way. If the bordering line of two states should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering states to agree to unite in draining the district, and thus removing the cause of disease. So in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repel the invasion of pestilence, without obtaining the consent of Congress, which might not be at the time in session."

To the same effect are *Wharton v. Wise*, 153 U. S. 155, 168-170; *Dodge v. Briggs*, 27 Fed. 160, 171, and 59 C. J. 36-37.

III.

The court overlooks the relationship of principal and agent which would exist between Missouri and the university of an adjacent state.

The State of Missouri in furnishing the facilities for higher education must necessarily act through some agency. The court in its decision overlooks the fact that

when the curators of Lincoln University carry out the authority in them vested by the Missouri statute (Sec. 9622, R. S. Mo., 1929) and arrange or contract with, let us say, the University of Illinois, for Gaines's attendance at the law school of that institution, and pay said university all it demands for such services, to-wit, the full tuition, the University of Illinois thereby becomes the agent of the State of Missouri to give Gaines the required education. And since Missouri makes this arrangement and pays the full price requested by Illinois therefor, it is *the State of Missouri* that gives Gaines the equal protection, and *not the State of Illinois*. It therefore is erroneous to say, as the opinion states, that "no state can be excused from performance by what another state may do or fail to do." Such a statement would be applicable if Missouri did not enter into the picture (as here), as the principal paying the price to the University of Illinois, which is the agent receiving the fee for services in supplying facilities for legal education.

Contracts of this kind are valid contracts although the performance thereof is to occur outside the territorial boundaries of Missouri (*Virginia v. Tennessee*, 148 U. S. 503, 518; *Wharton v. Wise*, 153 U. S. 155, 168-170; *Dodge v. Briggs*, 27 Fed. 160, 171; 59 Corpus Juris 36-37). And so long as this agency complies with the arrangement which Missouri makes with it for the education of Gaines, there can be no denial to Gaines of the equal protection of the law. The State of Illinois is satisfied with such an arrangement, as indicated by the fact that it receives negro students from other states (R. 87-88); and Gaines cannot raise any objection on its behalf. So long as this arrangement provides Gaines facilities for legal education substantially equal to those provided for

white students, he has not been deprived of any constitutional right and cannot complain.

IV.

The court overlooks its well-established canon of construction of the fourteenth amendment.

With the greatest respect we feel constrained to suggest that in approaching the solution of the problem here involved the court failed to consider and give effect to the well-established canon of construction so clearly and ably stated by the late Justice Holmes speaking for the unanimous court in *Noble State Bank v. Haskell*, 219 U. S. 104, 110. Justice Holmes there said that—

"we must be cautious about pressing the broad words of the fourteenth amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power."

The construction of the equal protection clause applied by the court in the case at bar fails to comply with the above canon of construction, which this court has for a long time heretofore observed in measuring state laws with the yardstick contained in the Fourteenth Amendment.

The court overlooks the effect of the failure of Gaines to apply to the curators of Lincoln University.

The court in its decision overlooks the settled rule that no one is entitled to judicial relief until the prescribed administrative remedy has been exhausted. In *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 616-617, this court through Justice Cardozo said:

"One who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal. *Lehon v. Atlanta*, 242 U. S. 53, 56; *Smith v. Cahoon*, 283 U. S. 553, 562. He should apply and see what happens."

In *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 50-51, this court through Mr. Justice Brandeis held that the contention of the shipbuilding corporation was—

"at war with the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

To the same effect are *Petroleum Exploration, Inc., v. Public Service Commission*, 304 U. S. 209, 222-3; *Bourjois, Inc., v. Chapman*, 301 U. S. 183, 188; *Natural Gas Co. v. Slaterry*, 302 U. S. 300, 309; *Goldsmith v. Board of Tax Appeals*, 270 U. S. 117, 123; *Gundling v. Chicago*, 177 U. S. 183, 186; *Smith v. Cahoon*, 283 U. S. 553, 561-2; *Porter v. Investors Syndicate*, 286 U. S. 461, 468, 471; *Lehon v. City of Atlanta*, 242 U. S. 53, 55-6; *Lieberman v. Van De Carr*, 199 U. S. 552, 562, and *Ex parte Virginia Commissioners*, 112 U. S. 177.

The record shows that Gaines deliberately refused to avail himself of the provisions made by the state for his benefit, by refusing to apply to the Lincoln University curators, the agency of the state charged with the furnishing of higher education to its negro citizens (R. 74, 82, 83, 84, 85-86, 218-219, 222). *He even declined under oath to say whether he would have attended a law school in Lincoln University if one had been established there on a par with the law school at the University of Missouri.* This appears at page 88 of the record, as follows:

"Q. At page 69 of your deposition, do you recall my asking you if a good law school were established at Lincoln University, one that would be on a par with that at Missouri University, whether you would attend it, and you refused to answer—didn't you?

A. Yes, sir."

This attitude on the part of Gaines must leave this court as well as the State of Missouri in the dark as to the good faith of Gaines's application.

We respectfully submit that the court should have decided this question. The mention in the opinion of what the President of Lincoln University wrote Gaines does not answer the point, because the president had no power to act or bind the board of curators. The Board of Curators of Lincoln University alone had the power under the statutes (Sec. 9618, 9622, R. S. Mo., 1929), to provide legal education at Lincoln University. Under the above authorities it was the duty of Gaines to apply to the Lincoln curators, and his failure to do so leaves him in no position to ask judicial relief.

VI.

The far-reaching effect of the court's decision.

The principle of race separation in educational facilities is firmly established in many of the states. It is founded in long-established and deeply-rooted tradition. It is a condition, not a theory.

While maintaining this tradition seven of these states, exercising their police power, in a good faith attempt to solve this difficult problem in a manner to conserve the general welfare of both races, have provided for race separation in higher education, and have enacted laws designed in good faith to give the negro equal facilities for higher education—by out-of-state instruction. (Of these states only Missouri has established a state university for negroes within its borders.) The laws of these seven states are printed in the appendix to petitioner's brief (pages 25-37). Those laws are in actual operation, to the reasonable satisfaction of all fair-minded persons.

So far as Kentucky, Maryland, Oklahoma, Tennessee, Virginia and West Virginia are concerned (each of which has made provision for out-of-state instruction but has no negro university within its borders), the decision means that these states will be compelled either to admit negroes to sit with white boys and girls in their state universities, or to build separate negro universities within their borders to take care of any demand for higher education of negroes which might arise. Because of long-settled and deeply-rooted traditions, and through a well-founded fear of the consequences of any change, it is reasonably certain that those states cannot and will not abolish race separation. So the only choice open to them is either to abolish their state universities and depend upon private

institutions for the education of white students, or to build negro universities within their borders to be ready to supply, immediately on demand, higher education for negroes in every branch of learning taught in the state university—and this too *even though there may never have been any demand* for education in some, or any, of those branches, and even though it cannot reasonably be foreseen that there ever will be such a demand. The dilemma forced upon these states by the opinion is obviously a serious one.

The effect of the decision so far as Missouri is concerned is twofold:

First. The State must at once establish in Lincoln University each and every course of instruction available at the University of Missouri, whether there has ever been any demand therefor by any Missouri negro or not. This because conceivably such a demand may arise; and if it does arise the State must at once be in a position to satisfy it. The result will be a number of new departments in Lincoln University with *idle teaching staffs and empty classrooms*.

Second. If the State should desire to expand the curriculum in the University of Missouri by the addition of new courses of instruction, for which there has arisen a demand from white students but for which there is absolutely no demand from negroes, then the State must at once establish the same courses of study at Lincoln University—again with *idle teaching staffs and no students*. The natural economic result would be to deter the State from the normal expansion of its higher educational institutions.

The problem presented here is intensely practical, and must be solved with due regard for the *actual needs* of the two races, rather than upon the basis of purely theoretical considerations. As stated in the dissenting opinion:

"The problem presented obviously is a difficult and highly practical one. A fair effort to solve it has been made by offering adequate opportunity for study when sought in good faith. The State should not be unduly hampered through theorization inadequately restrained by experience."

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Supreme Court of Missouri be, upon further consideration, affirmed.

Respectfully submitted,

FRED L. WILLIAMS,

FRED L. ENGLISH,

NICK T. CAVE,

WILLIAM S. HOGSETT,

Counsel for Respondents.

Certificate of counsel.

We, the undersigned, counsel for the above-named respondents, do each hereby certify that the foregoing Petition for a Rehearing of this cause is presented in good faith and not for delay.

FRED L. WILLIAMS,

FRED L. ENGLISH,

NICK T. CAVE,

WILLIAM S. HOGSETT,

Counsel for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 57.—OCTOBER TERM, 1938.

State of Missouri, at the relation of Lloyd Gaines, Petitioner, vs. S. W. Canada, Registrar of the University of Missouri, and the Curators of the University of Missouri.	}	On Writ of Certiorari to the Supreme Court of the State of Mis- souri.
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[December 12, 1938.]

Mr. Chief Justice HUGHES delivered the opinion of the Court.

Petitioner Lloyd Gaines, a negro, was refused admission to the School of Law of the State University of Missouri. Asserting that this refusal constituted a denial by the State of the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution, petitioner brought this action for mandamus to compel the curators of the University to admit him. On final hearing, an alternative writ was quashed and a peremptory writ was denied by the Circuit Court. The Supreme Court of the State affirmed the judgment. 113 S. W. (2d) 783. We granted, certiorari. — U. S. —

Petitioner is a citizen of Missouri. In August, 1935, he was graduated with the degree of Bachelor of Arts at the Lincoln University, an institution maintained by the State of Missouri for the higher education of negroes. That University has no law school. Upon the filing of his application for admission to the law school of the University of Missouri, the registrar advised him to communicate with the president of Lincoln University and the latter directed petitioner's attention to Section 9622 of the Revised Statutes of Missouri (1929), providing as follows:

"Sec. 9622. *May arrange for attendance at university of any adjacent state—Tuition fees.*—Pending the full development of the Lincoln university, the board of curators shall have the authority to arrange for the attendance of negro residents of the state of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the state university of Missouri, and which are not taught at the Lincoln university and

to pay the reasonable tuition fees for such attendance; provided that whenever the board of curators deem it advisable they shall have the power to open any necessary school or department. (Law 1921, p. 86, § 7.)"

Petitioner was advised to apply to the State Superintendent of Schools for aid under that statute. It was admitted on the trial that petitioner's "work and credits at the Lincoln University would qualify him for admission to the School of Law of the University of Missouri if he were found otherwise eligible". He was refused admission upon the ground that it was "contrary to the constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri". It appears that there are schools of law in connection with the state universities of four adjacent States, Kansas, Nebraska, Iowa and Illinois, where non-resident negroes are admitted.

The clear and definite conclusions of the state court in construing the pertinent state legislation narrow the issue. The action of the curators, who are representatives of the State in the management of the state university (R. S. Mo., Sec. 9625), must be regarded as state action.¹ The state constitution provides that separate free public schools shall be established for the education of children of African descent (Art. XI, Sec. 3), and by statute separate high school facilities are supplied for colored students equal to those provided for white students (R. S. Mo., Secs. 9346-9349). While there is no express constitutional provision requiring that the white and negro races be separated for the purpose of higher education, the state court on a comprehensive review of the state statutes held that it was intended to separate the white and negro races for that purpose also. Referring in particular to Lincoln University, the court deemed it to be clear "that the Legislature intended to bring the Lincoln University up to the standard of the University of Missouri, and give to the whites and negroes an equal opportunity for higher education—the whites at the University of Missouri, and the negroes at Lincoln University". Further, the court concluded that the provisions of Section 9622 (above quoted) to the effect that negro residents "may attend the university of any adjacent State with their tuition paid, pending the full development of Lincoln

¹ Ex parte Virginia, 100 U. S. 313, 346, 347; Neal v. Delaware, 103 U. S. 370, 397; Carter v. Texas, 177 U. S. 442, 447; Norris v. Alabama, 294 U. S. 587, 589.

University", made it evident "that the Legislature did not intend that negroes and whites should attend the same university in this state". In that view it necessarily followed that the curators of the University of Missouri acted in accordance with the policy of the State in denying petitioner admission to its School of Law upon the sole ground of his race.

In answering petitioner's contention that this discrimination constituted a denial of his constitutional right, the state court has fully recognized the obligation of the State to provide negroes with advantages for higher education substantially equal to the advantages afforded to white students. The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions. *Plessy v. Ferguson*, 163 U. S. 537, 544; *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151, 160; *Gong Lum v. Rice*, 275 U. S. 78, 85, 86. Compare *Cumming v. Board of Education*, 175 U. S. 528, 544, 545. Respondents' counsel have appropriately emphasized the special solicitude of the State for the higher education of negroes as shown in the establishment of Lincoln University, a state institution well conducted on a plane with the University of Missouri so far as the offered courses are concerned. It is said that Missouri is a pioneer in that field and is the only State in the Union which has established a separate university for negroes on the same basis as the state university for white students. But, commendable as is that action, the fact remains that instruction in law for negroes is not now afforded by the State, either at Lincoln University or elsewhere within the State, and that the State excludes negroes from the advantages of the law school it has established at the University of Missouri.

It is manifest that this discrimination, if not relieved by the provisions we shall presently discuss, would constitute a denial of equal protection. That was the conclusion of the Court of Appeals of Maryland in circumstances substantially similar in that aspect. *University of Maryland v. Murray*, 169 Md. 478. It there appeared that the State of Maryland had "undertaken the function of education in the law" but had "omitted students of one race from the only adequate provision made for it, and omitted them solely because of their color"; that if those students were to be offered "equal treatment in the performance of the function, they must, at present, be admitted to the one school provided". *Id.*, p. 489.

A provision for scholarships to enable negroes to attend colleges outside the State, mainly for the purpose of professional studies, was found to be inadequate (*Id.*, pp. 485, 486) and the question, "whether with aid of any amount it is sufficient to send the negroes outside the State for legal education", the Court of Appeals found it unnecessary to discuss. Accordingly, a writ of mandamus to admit the applicant was issued to the officers and regents of the University of Maryland as the agents of the State entrusted with the conduct of that institution.

The Supreme Court of Missouri in the instant case has distinguished the decision in Maryland upon the grounds—(1) that in Missouri, but not in Maryland, there is "a legislative declaration of a purpose to establish a law school for negroes at Lincoln University whenever necessary or practical"; and (2) that, "pending the establishment of such a school, adequate provision has been made for the legal education of negro students in recognized schools outside of this State". 113 S. W. (2d) p. 791.

As to the first ground, it appears that the policy of establishing a law school at Lincoln University has not yet ripened into an actual establishment, and it cannot be said that a mere declaration of purpose, still unfulfilled, is enough. The provision for legal education at Lincoln is at present entirely lacking. Respondents' counsel urge that if, on the date when petitioner applied for admission to the University of Missouri, he had instead applied to the curators of Lincoln University it would have been their duty to establish a law school; that this "agency of the State", to which he should have applied, was "specifically charged with the mandatory duty to furnish him what he seeks". We do not read the opinion of the Supreme Court as construing the state statute to impose such a "mandatory duty" as the argument seems to assert. The state court quoted the language of Section 9618, R. S. Mo. 1929, set forth in the margin,² making it the mandatory duty of

² Section 9618, R. S. Mo. 1929, is as follows:

"Sec. 9618. *Board of curators authorized to reorganize.*—The board of curators of the Lincoln university shall be authorized and required to reorganize said institution so that it shall afford to the negro people of the state opportunity for training up to the standard furnished at the state university of Missouri whenever necessary and practicable in their opinion. To this end the board of curators shall be authorized to purchase necessary additional land, erect necessary additional buildings, to provide necessary additional equipment, and to locate, in the county of Cole the respective units of the university when, in their opinion, the various schools will most effectively promote the purposes of this article. (Laws of 1921, p. 86, § 3.)"

the board of curators to establish a law school in Lincoln University "whenever necessary and practicable in their opinion". This qualification of their duty, explicitly stated in the statute, manifestly leaves it to the judgment of the curators to decide when it will be necessary and practicable to establish a law school, and the state court so construed the statute. Emphasizing the discretion of the curators, the court said:

"The statute was enacted in 1921. Since its enactment no negro, not even appellant, has applied to Lincoln University for a law education. This fact demonstrates the wisdom of the legislature in leaving it to the judgment of the board of curators to determine when it would be necessary or practicable to establish a law school for negroes at Lincoln University. Pending that time adequate provision is made for the legal education of negroes in the university of some adjacent State, as heretofore pointed out". 113 S. W. (2d) p: 791.

The state court has not held that it would have been the duty of the curators to establish a law school at Lincoln University for the petitioner on his application. Their duty, as the court defined it, would have been either to supply a law school at Lincoln University as provided in Section 9618 or to furnish him the opportunity to obtain his legal training in another State as provided in Section 9622. Thus the law left the curators free to adopt the latter course. The state court has not ruled or intimated that their failure or refusal to establish a law school for a very few students, still less for one student, would have been an abuse of the discretion with which the curators were entrusted. And, apparently, it was because of that discretion, and of the postponement which its exercise in accordance with the terms of the statute would entail until necessity and practicability appeared, that the state court considered and upheld as adequate the provision for the legal education of negroes, who were citizens of Missouri, in the universities of adjacent States. We may put on one side respondents' contention that there were funds available at Lincoln University for the creation of a law department and the suggestions with respect to the number of instructors who would be needed for that purpose and the cost of supplying them. The president of Lincoln University did not advert to the existence or prospective use of funds for that purpose when he advised petitioner to apply to the State Superintendent of Schools for aid under Section 9622. At best,

the evidence to which argument as to available funds is addressed admits of conflicting inferences, and the decision of the state court did not hinge on any such matter. In the light of its ruling we must regard the question whether the provision for the legal education in other States of negroes resident in Missouri is sufficient to satisfy the constitutional requirement of equal protection, as the pivot upon which this case turns.

The state court stresses the advantages that are afforded by the law schools of the adjacent States, Kansas, Nebraska, Iowa and Illinois, which admit non-resident negroes. The court considered that these were schools of high standing where "one" desiring to practice law in Missouri can get "as sound, comprehensive, valuable legal education" as in the University of Missouri; that the system of education in the former is the same as that in the latter and is designed to give the students a basis for the practice of law in any State where the Anglo-American system of law obtains; that the law school of the University of Missouri does not specialize in Missouri law and that the course of study and the case books used in the five schools are substantially identical. Petitioner insists that for one intending to practice in Missouri there are special advantages in attending a law school there, both in relation to the opportunities for the particular study of Missouri law and for the observation of the local courts,² and also in view of the prestige of the Missouri law school among the citizens of the State, his prospective clients. Proceeding with its examination of relative advantages, the state court found that the difference in distances to be traveled afforded no substantial ground of complaint and that there was an adequate appropriation to meet the full tuition fees which petitioner would have to pay.

We think that these matters are beside the point. The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal

² See *University v. Murray*, 169 Md. 478, 486.

training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

The equal protection of the laws is "a pledge of the protection of equal laws". *Yick Wo v. Hopkins*, 118 U. S. 356, 369. Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities,—each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system. It seems to be implicit in respondents' argument that if other States did not provide courses for legal education, it would nevertheless be the constitutional duty of Missouri when it supplied such courses for white students to make equivalent provision for negroes. But that plain duty would exist because it rested upon the State independently of the action of other States. We find it impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere. That resort may mitigate the inconvenience of the discrimination but cannot serve to validate it.

Nor can we regard the fact that there is but a limited demand in Missouri for the legal education of negroes as excusing the discrimination in favor of whites. We had occasion to consider a

cognate question in the case of *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*, *supra*. There the argument was advanced, in relation to the provision by a carrier of sleeping cars, dining and chair cars, that the limited demand by negroes justified the State in permitting the furnishing of such accommodations exclusively for white persons. We found that argument to be without merit. It made, we said, the constitutional right "depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded". *Id.*, pp. 161, 162.

Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.

It is urged, however, that the provision for tuition outside the State is a temporary one,—that it is intended to operate merely pending the establishment of a law department for negroes at Lincoln University. While in that sense the discrimination may be termed temporary, it may nevertheless continue for an indefinite period by reason of the discretion given to the curators of Lincoln University and the alternative of arranging for tuition in other States, as permitted by the state law as construed by the state court, so long as the curators find it unnecessary and impracticable to provide facilities for the legal instruction of negroes within the State. In that view, we cannot regard the discrimination as excused by what is called its temporary character.

We do not find that the decision of the state court turns on any procedural question. The action was for mandamus, but it does not appear that the remedy would have been deemed inappropriate.

if the asserted federal right had been sustained. In that situation the remedy by mandamus was found to be a proper one in *University v. Maryland, supra*. In the instant case, the state court did note that petitioner had not applied to the management of Lincoln University for legal training. But, as we have said, the state court did not rule that it would have been the duty of the curators to grant such an application, but on the contrary took the view, as we understand it, that the curators were entitled under the state law to refuse such an application and in its stead to provide for petitioner's tuition in an adjacent State. That conclusion presented the federal question as to the constitutional adequacy of such a provision while equal opportunity for legal training within the State was not furnished, and this federal question the state court entertained and passed upon. We must conclude that in so doing the court denied the federal right which petitioner set up and the question as to the correctness of that decision is before us. We are of the opinion that the ruling was error, and that petitioner was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State.

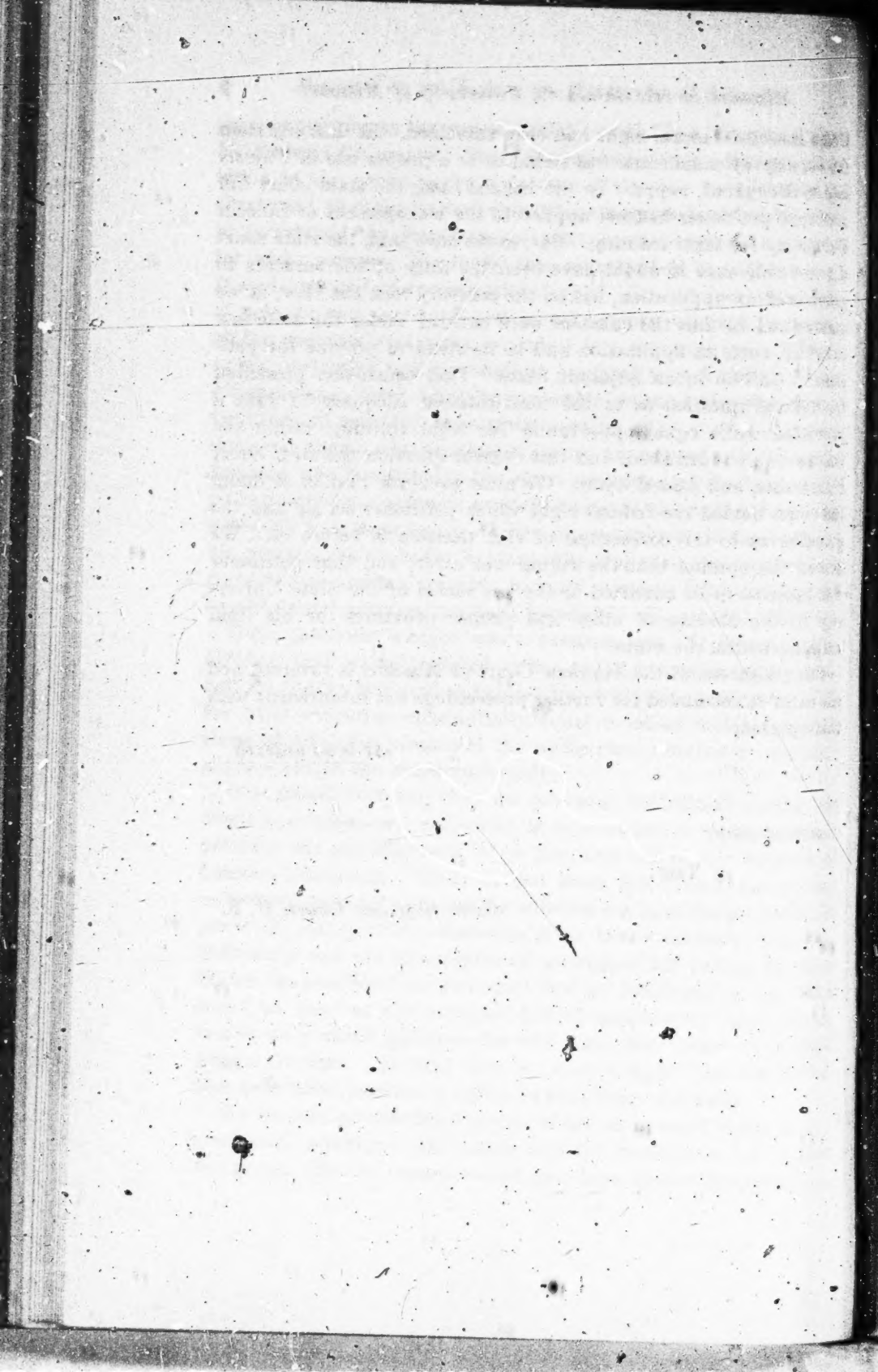
The judgment of the Supreme Court of Missouri is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.



SUPREME COURT OF THE UNITED STATES.

No. 57.—OCTOBER TERM, 1938.

State of Missouri, at the relation of
Lloyd Gaines, Petitioner,
vs.
S. W. Canada, Registrar of the University
of Missouri, and the Curators of the
University of Missouri.

On Writ of Certiorari
to the Supreme Court
of the State of Mis-
souri.

Separate opinion of Mr. Justice McREYNOLDS.

Considering the disclosures of the record, the Supreme Court of Missouri arrived at a tenable conclusion and its judgment should be affirmed. That court well understood the grave difficulties of the situation and rightly refused to upset the settled legislative policy of the State by directing a mandamus.

In *Cumming v. Richmond County Board of Education*, 175 U. S. 528, 545, this Court through Mr. Justice Harlan declared—"The education of the people in schools maintained by state taxation is a matter belonging to the respective States; and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land." *Gong Lum v. Rice*, 275 U. S. 78, 85—opinion by Mr. Chief Justice Taft—asserts: "The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear."

For a long time Missouri has acted upon the view that the best interest of her people demands separation of whites and negroes in schools. Under the opinion just announced, I presume she may abandon her law school and thereby disadvantage her white citizens without improving petitioner's opportunities for legal instruction; or she may break down the settled practice concerning separate schools and thereby, as indicated by experience, damnify both races. Whether by some other course it may be possible for her to avoid condemnation is matter for conjecture.

The State has offered to provide the negro petitioner opportunity for study of the law—if perchance that is the thing really desired—by paying his tuition at some nearby school of good standing. This is far from unmistakable disregard of his rights and in the circumstances is enough to satisfy any reasonable demand for specialized training. It appears that never before has a negro applied for admission to the Law School and none has ever asked that Lincoln University provide legal instruction.

The problem presented obviously is a difficult and highly practical one. A fair effort to solve it has been made by offering adequate opportunity for study when sought in good faith. The State should not be unduly hampered through theorization inadequately restrained by experience.

This proceeding commenced in April, 1936. Petitioner then twenty-four years old asked mandamus to compel his admission to the University in September, 1936, notwithstanding plain legislative inhibition. Mandamus is not a writ of right but is granted only in the court's discretion upon consideration of all the circumstances. *Duncan Townsite Company v. Lane, Secretary of the Interior*, 245 U. S. 308, 311; *United States ex rel. Arant v. Lane, Secretary of the Interior*, 249 U. S. 367, 371.

The Supreme Court of Missouri did not consider the propriety of granting the writ under the theory of the law now accepted here. That, of course, will be matter open for its consideration upon return of the cause.

Mr. Justice BUTLER concurs in the above views.